NO. 2840

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARY N. LUCAS,

Plaintiff in Error,

vs.

WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said WALTER W. SCOTT, JANET M. SCOTT and RUBENA F. SCOTT, Minors,

Defendants in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR

UPON WRIT OF ERROR TO THE SUPREME COURT OF THE TERRITORY OF HAWAII

In the United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

MARY N. LUCAS, Defendant, Plaintiff in Error, v. WALTER W. SCOTT, a Minor, JANET M. SCOTT, a Minor, RUBENA F. SCOTT, a Minor, and the BISHOP TRUST COMPANY, LIMITED, a Corporation, Guardian of the Estate of said Walter W. Scott, Janet M. Scott and Rubena F. Scott, Minors, Plaintiffs, Defendants in Error.	Submission of Case on Agreed Facts. ON WRIT OF ERROR TO THE SUPREME COURT OF HAWAII.

I.

STATEMENT OF CASE.

This case comes to this court on a writ of error to review the decision and judgment of the Supreme Court of Hawaii. It originated in the latter court and is a submission of questions in difference between the parties upon an agreed statement of facts. (Transcript of Record, p. 1.) The proceeding was authorized by and is in entire conformity with Hawaiian statutes (Revised Laws of Hawaii, 1915, Sections 2381 et seq.), which permit the submission di-

rectly to the local Supreme Court of issues of law arising upon facts as to which there is no dispute. Sections 2381, 2382 and 2383 read as follows:

"Sec. 2381. To Supreme Court; Affidavit. Parties to a question in difference which might be the subject of a civil action in the circuit court or supreme court may, without action, agree upon a case containing the facts upon which a controversy depends and present a submission of the same to the justices of the supreme court either in term time or in vacation; but it must appear by affidavit that the controversy is real and the proceedings in good faith to determine the rights of the parties; *Provided,* however, that the justices of the supreme court may in their discretion require the case to be first submitted to a circuit judge at chambers, subject to appeal.

"Sec. 2382. Judgment in Writing. The justices, or a majority of them, shall thereupon hear and determine the case, and render judgment thereon, in writing, as if an action were depending.

"Sec. 2383. Entry of Jugdment; Record. Judgment shall be entered in such case, as in ordinary civil actions. The case, the submission, and the written decision, shall constitute the record."

The necessary affidavit was filed and the Supreme Court entertained jurisdiction, without requiring the case to be first submitted to a circuit judge at chambers, and subsequently filed its decision and its formal judgment.

The agreed facts are substantially as follows:

One Christian Henry Bertelmann of Pilaa, Kauai, Territory of Hawaii (who will be hereinafter called "the testator"), died at Pilaa on or about February 15, 1895, being at the time of his death seized in fee

of certain parcels of land which are described in Exhibit "A" attached to and made a part of the submission (Transcript of Record, p. 17), the title to which is the subject for adjudication in this case. He also owned other property, not involved in the present controversy. He left surviving him three sons, Frank, Henry and Christian, and six daughters, Catherine, Angeline, Wilhelmina, Justine, Josephine, and Beatrice. Catherine died on or about September 10, 1905, leaving surviving her three children, Walter W. Scott, Janet M. Scott and Rubena F. Scott, who are the plaintiffs in this case. The remaining children, both sons and daughters of the testator, are still living. Frank Scott, the husband of Catherine and father of the three plaintiffs, died in January, 1908. Susan C. Bertelmann, widow of the testator, died in September, 1915. The Bishop Trust Company, Limited, is the duly appointed guardian of the estate of the three minors, defendants in error.

Christian Henry Bertelmann left a will, executed December 12, 1891, a copy of which is made a part of the submission. (Transcript, p. 19.) This will, duly admitted to probate on or about April 18, 1895, contained certain devises in favor of the children, and certain of these devises are to be the subjects of construction in this case. The defendant, Mary N. Lucas, has acquired, by various conveyances, all of the right, title and interest of the three sons of the testator acquired by them under the will of their

father in and to the property referred to under article "Third" of the will. She has also acquired, by various other conveyances, all of the right, title and interest of Justine, Josephine, Beatrice, Angeline and Wilhelmina, daughters of the testator under the will of their father in and to the property mentioned in the same article "Third." These deeds of the sons were joined in by their wives by way of releasing their dower, and those of the daughters were joined in by their husbands by way of showing their assent to the deeds of the wives as required by Hawaiian law. A copy of each of the conveyances referred to is made a part of the submission. A complete list of these deeds to Mary N. Lucas with dates of execution and reference to the printed record follows:

Deed of Frank's Interest, February 7, 1903, pp. 34 to 55;

Deed of Justine's Interest, March 14, 1903, p. 55;

Deed of Josephine's Interest, May 18, 1903, p. 59;

Deed of Beatrice's Interest, October 12, 1904, p. 63;

Deed of Angeline's Interest, January 16, 1907, p. 67;

Deed of Christian's Interest, September 12, 1907, p. 29;

Deed of Henry's Interest, March 5, 1910, p. 25;

Deed of Wilhelmina's Interest, November 29, 1915, p. 71.

November 1, 1890, the testator leased to the Kilauea Sugar Company, an Hawaiian corporation, all of the lands and other property described in Exhibit

"A" (Tr., p. 17) and including all of the lands and other property referred to in article "Third" of the will "for and during the term of twenty-five years from the first day of November, 1890, fully to be complete and ended." This lease was not at any time revoked, cancelled or surrendered or its term in any way shortened. It continued in operation for its full term of twenty-five years, until November 1, 1915. This is the same "twenty-five years' lease" referred to by the testator in his will. The period of one year mentioned in Article "Third" of the will is, therefore, still running and will expire on November 1, 1916.

Articles "Third" and "Fourth" of the will are quoted hereinafter. The controversy is as to the construction of Article "Third." The contention of the defendants in error is that the words "surviving daughters" in that article relate to the time of the testator's death; that the daughter Catherine who survived the testator and died before November 1, 1915, the expiration of the lease, was, therefore, a "surviving daughter" within the meaning of that article; that under the will a vested estate, a one-ninth interest, was devised to her which upon her death descended to her three children, the present plaintiffs; that although if Catherine had survived the expiration of the lease her interest could have been defeated by the payment of five thousand ($5000.00) dollars to her, still that same interest in her children cannot now be defeated because the condition has by an act of God (her death before the

expiration of the lease) become impossible of performance and that, therefore, the three children now own an undivided one-ninth interest in the lands mentioned in Article "Third" of the will and that interest is indefeasible by Mary N. Lucas, the assignee of the three sons, or by anyone else.

The contention of the plaintiff in error, on the other hand, is that the expiration of the lease, to wit, November 1, 1915, and not the death of the testator, is the period of survivorship referred to in the phrase "surviving daughters" used in Article "Third" of the will; that, therefore, the daughter Catherine, who died before November 1, 1915, although after the testator, is not a "surviving daughter" within the meaning of Article "Third' of the will; that the devise of one-ninth to Catherine was not of an estate which vested on the testator's death, but was contingent upon her survivorship of the lease and upon non-payment to her at or within one year after the expiration of the lease of the sum of $5000 by the three sons or one or more of them; that whether the devise to Catherine was of a vested estate or was contingent in its nature, the condition, whether it was a condition of defeasance or a condition of vesting, was one and the same condition only and permitted the sons or one or more of them to pay the $5000 to Catherine or her heirs within the time stated and thus bring into full operation the devise to them (the sons) of any interest which might otherwise have gone to Catherine; that, Catherine not having survived the expiration of the lease,

the will does not require of the sons or any of them that they pay $5000 to defeat the interest which would otherwise have gone to Catherine and that the payments to all of the other daughters by the sons was a complete performance of the condition; that the children of Catherine have now no right, title or interest in the property mentioned in Article "Third" of the will and that the plaintiff in error, the assignee of the three sons, is now the sole owner, the "undisputable" owner as the will calls it, of all of the said lands without making any payment to the children of Catherine of $5000 or any other sum; and that even though the correct construction of the will is that the death of the testator was the period of survivorship referred to in Article "Third" and that, therefore, Catherine was a "surviving daughter," and even though the devise to her was of an interest which vested upon the testator's death and descended to her three children, nevertheless, the interest of the three children was subject to the same quality of defeasibility upon payment to them by the sons or one or more of them of $5000 and that, therefore, even under these assumptions the plaintiff in error is now entitled to defeat the one-ninth interest of the children by payment to them before November 1, 1916, of the sum of $5000.

These contentions were all advanced before the Supreme Court of Hawaii and are the contentions before this court. The opinion below was by a divided court, Chief Justice Robertson dissenting. The majority held (Tr., p. 81) that the death of the tes-

tator was the period of survivorship referred to and that Catherine was a "surviving daughter"; that the devise to her was of a vested interest, defeasible upon the condition stated, and that consequently the condition was a condition subsequent; that upon her death her one-ninth interest descended to her three children; that conditions subsequent must be strictly construed; that the condition named in Article "Third" required as one of its elements the payment of the $5000 *to Catherine personally in her lifetime*; that the payments of $5000 were not to be made until at and after the expiration of the lease; that by reason of Catherine's death prior to the expiration of the lease, the condition of defeasance became impossible of performance and that the case stands, therefore, as though there were no condition of defeasance; that Catherine's children now own an undivided one-ninth interest in the lands mentioned in Article "Third" and that Mary Lucas, the assignee of the sons, has not the right to defeat that interest upon payment of $5000. The majority also said that "the privilege granted" to the sons to pay the $5000 to each daughter and thus defeat the interests of the latter "seems personal" and non-assignable by the sons.

Chief Justice Robertson held (Tr., p. 90) that the devise to Catherine was a conditional limitation rather than an estate upon a condition subsequent and that the dominating intent of the testator was that "the sons should have the right to acquire the whole of the leased land on giving to the daughters

what the testator evidently considered a fair equivalent for the interests devised to them"; that that was a lawful intent which should be carried out by the court; that in order to effectuate that intent it should be held that "as to the estate of a deceased daughter which has passed to her heirs," the sons have a right to pay those heirs the sum which the will stated should have been paid to the daughter had she lived; that properly construed "the condition precedent which the testator imposed to the acquisition by the sons of the estates given to the daughters was not that they should make payment to the surviving daughters only but that they should pay the sum named for the interest given to each of the daughters and their heirs," and that "the right to acquire the interests of the daughters was not a mere personal privilege" but was assignable and could be exercised by a vendee of the sons. His conclusion was that the judgment should be that the defendants in error "are seized in fee of an undivided one-ninth of the land subject to the right of the defendant to acquire the same by the payment of $5000."

The formal judgment (Tr., p. 94) was to the effect that the defendants in error are the owners of an undivided one-ninth interest in the lands described in Article "Third" and that the plaintiff in error has no right, title or interest to the said one-ninth. It is to this judgment that the present writ of error is directed.

It should be added perhaps that there is a stipu-

lation in the original pleading or submission that if the court shall be of the opinion, after entering into consideration of the case, that some material fact necessary to a decision is not agreed upon or recited in the submission or that in matter of form the submission is defective, the parties shall be given an opportunity to amend the submission so as to correct any defect so found. (Tr., p. 16.) In other words, both parties are desirous of a decision based upon the merits and not upon any technical omission of theirs to state that which should have been stated. In pursuance of this stipulation, an amendment to the original submission was filed in the Supreme Court of Hawaii. (Tr., p. 76.)

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

The plaintiff in error relies upon each and all of the errors set forth in the assignment of errors on file herein. (Tr., p. 100.) They are as follows:

1, 3 and 4. That the lower court erred in holding and in rendering the judgment above recited (Tr., p. 94) to the effect that Catherine's children are now the owners of a one-ninth interest, indefeasible by any act of the plaintiff in error, and that the latter has no right or claim to that one-ninth interest.

2. That the court erred in holding that Mary N. Lucas has no right, title or interest in or to the one-

ninth interest held as above to belong to the three children.

5 and 7. That the court erred in holding and in rendering judgment upon the theory and to the effect that Catherine's three children are the absolute owners in fee of a one-ninth interest in the lands referred to in Article "Third" of the will of Bertelmann and that the children's said title is not defeasible and cannot be acquired by the plaintiff in error upon payment by her to the children or their guardian of the sum of $5000 within one year from and after the expiration of the 25 years' lease referred to in the will.

6. That the court erred in holding that the said three children have now any right, title or interest in the lands.

8. That the court erred in holding that where by a last will a remainder in fee is vested in a devisee subject to defeasance by a condition subsequent, and the condition becomes impossible of performance, the vested remainder is freed from the condition; and in holding that this rule has any application to the case at bar.

9. That the court erred in holding and in rendering judgment to the effect that under the will of Christian Henry Bertelmann his daughter Catherine took a vested remainder in fee subject to defeasance and in failing to hold and to render judgment to the effect that the interest devised to Catherine was contingent upon the conditions precedent that she survive the expiration of the 25-year lease and that the

sons of the testator fail to pay to her $5000 within one year after the expiration of the lease.

10 and 11. That the court erred in holding that it was not at liberty to disturb the decision in the case of *Bertelmann v. Kahilina,* reported in 14 Haw. 378, a case in which neither the present plaintiffs nor Catherine nor the testator's son Christian nor his daughter Beatrice were parties, and that the said decision in *Bertelmann v. Kahilina* has become an established rule of property so far as the rights involved in the case at bar are concerned or at all.

12. That the court erred in holding that under the said will, a vested remainder was devised to each of the daughters and that the defeasance of the remainder depended upon a condition subsequent.

13. That the court erred in holding that the death of Catherine prior to the termination of the 25-year lease rendered the condition subsequent whereby the estate, said by the court to have been vested in Catherine, could have been but for her death at that time divested, impossible of performance.

14. That the court erred in holding and in rendering judgment upon the theory that the condition in Article "Third" of the will relating to the $5000 payments by the sons required for its performance a payment to Catherine personally and that a payment in all other respects valid and sufficient to Catherine's children and heirs after her death would not be a performance of the condition and would not defeat or prevent the vesting of the one-ninth interest in the three children.

15. That the court erred in holding and in rendering judgment to the effect that Catherine's three children inherited the one-ninth interest from their mother freed from the condition of defeasance which, as it held, attached to their mother's estate during her lifetime.

16. That the court erred in holding and in rendering judgment to the effect that neither the testator's sons nor any one or more of them, nor any their assignee, can now defeat the one-ninth interest which, as it held, was devised to Catherine under the said will and descended to and became vested in her three children.

17. That the court erred in holding and in rendering judgment to the effect that the said will "shows clearly a manifest intent" on the part of the testator "that his three sons and six daughters should share equally."

18. That the court erred in holding that the right or privilege granted by the will to the sons and to one or more of them to defeat the interests of the daughters by making the payments stated and thereby to acquire for themselves, the sons so paying, in fee simple absolute all of the lands mentioned in Article "Third" of the will "seems personal" and that "no intention can be found in the will that the daughters should be obliged to sell" their interests at $5000 "to any one other than the sons or one or more of them."

19. That the court erred in not holding that upon the agreed facts the plaintiff in error is as against

Catherine's children and without making to Catherine or to her children any payment of $5000, the sole and "undisputable" owner, i. e., the owner in fee simple absolute of all of the lands in question and of all of the right, title and interest therein which, under circumstances other than those existing, might have passed to Catherine.

20. That the court erred in not holding that Catherine's children and their guardian have now no right, title or interest in the lands in question or in or to any payment of $5000 by the testator's sons or any of them or by the plaintiff in error, their assignee.

21. That the court erred in not holding that even if Catherine's children inherited from her and have now a one-ninth interest in the lands in question, nevertheless Mary Lucas has a right to defeat all of their interest and to acquire it for herself by paying or tendering to them or their guardian the sum of $5000 within the time prescribed in Article "Third" of the will and that if Mary Lucas shall make said payment to said children within said time she can and will acquire for herself all of the right, title and interest of said children and can and will thereby as against them render her title perfect to all of the lands in question in fee simple absolute.

22 and 23. That the court erred in holding that the words of survivorship in the phrase "surviving daughters" wherever it occurs in Article "Third" of the will refer to the death of the testator, and in not

holding that they refer to the expiration of the 25-year lease.

24 and 25. That the court erred in holding that under the circumstances of the case, Catherine was one of the "surviving daughters" within the meaning of Article "Third," and in not holding that under the circumstances of the case she was not one of the "surviving daughters."

26. That the court erred in not holding that the condition imposed upon the sons under Article "Third" of the will relating to the payment there mentioned to each of the daughters was and is, as to any interest devised to Catherine, possible of performance in spite of the fact that Catherine died before the expiration of the lease.

27. That the court erred is not holding that the interests of the sons of the testator and each of them under the will, and particularly under Article "Third" thereof, in the lands in question were wholly assignable.

28. That the court erred in not holding that the right or privilege of the sons and each of them to defeat and to acquire for themselves the interests of the daughters, and particularly Catherine's interest in the lands in question, by making the payments mentioned in Article "Third" was assignable and could and can be exercised by Mary N. Lucas, the assignee of the three sons.

29. That the court erred in not holding that the right and privilege of the sons and each of them to defeat and to acquire for themselves the interest of

Catherine and of her heirs after her by way of succession to her by paying $5000 to Catherine or to her heirs within the time prescribed and upon the other conditions named in Article "Third" was assignable and could and can be exercised by Mary Lucas, the assignee of the three sons of the said testator.

III.

ARGUMENT.

1.

NO UNUSUAL WEIGHT ATTACHES TO THE MAJORITY OPINION APPEALED FROM.

In entering upon the argument it is respectfully urged that there is nothing in the nature of this case, in its facts or in its law, which renders it incumbent upon this court to accept the decision appealed from or any views there expressed as binding upon this court or as entitled to some unusual degree of weight. There is nothing peculiarly Hawaiian in the law involved, whether written or unwritten. The facts could all as well have occurred on the mainland of the United States. The will under consideration could as well have been drawn and probated on the mainland and it can as well be construed there. The Supreme Court of Hawaii possessed no peculiar advantages in the decision of the case, and this appellate court is in as advantageous a position as the lower court was to determine all the issues involved.

The act of Congress gives us the right to a complete review at the hands of this court of the decision appealed from and to the views and the decision of the members of this court.

2.

THE DOCTRINE OF *STARE DECISIS* AND THAT OF *RES JUDICATA* INAPPLICABLE IN FAVOR OF THE KAHILINA DECISION.

In 1902, in the case of *Bertelmann v. Kahilina,* the opinions in which are reported in 14 Haw. 378, two of the testator's (Christian Henry Bertelmann's) sons, Frank and Henry, his widow, Susan B. Kahilina, and four of his daughters, Justine, Angeline, Wilhelmina and Hattie, joined in a submission under the statute upon an agreed statement of facts, the son Christian and the daughters Beatrice and Catherine not being parties. In that case the claim of the two sons was that they owned under the will two undivided thirds in fee simple of the estate; the claim of the four daughters was that they and the two sons alike owned an undivided one-ninth each; and the question submitted was what right, title or interest each of the six parties had under the will (14 Haw. 387). That was about thirteen years before the expiration of the 25-year lease referred to in Article "Third" of the will. The court, with one of its three justices dissenting, held that "the widow took a life estate in one-third the land, subject to be divested upon the performance of the conditions

prescribed in the third item, in which case she would thereafter have a fixed sum of $2000 a year, which would be a charge on the land," and that "the children took, subject to the widow's interest, equal estates until the expiration of the lease, with vested remainders in fee, the former merging in the latter so as to make present vested estates in fee, defeasible as to the interests of the daughters and shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent executory devises as to such interests." The dissenting opinion was that the sons under clause "Third" took a contingent remainder or contingent executory devise, contingent upon survival of the expiration of the lease and upon their ability and willingness to pay $5000 to each of the surviving daughters; that all that was devised to the "surviving daughters" in the event of performance by the sons was the sum of $5000 each; and that in the event of failure of the contingencies of survivorship of and payment by the sons, each of the nine children would take one-ninth of the estate, the heirs of any child then deceased taking its parent's share by right of representation.

The contentions of the present defendants in error and the rulings of the two justices of the Supreme Court of Hawaii in their majority opinion now under review, appear to be based very largely upon the ruling of the majority in *Bertelmann v. Kahilina.* In the case at bar the majority even says that the former decision "has become an established rule of

property so far as the rights here involved are concerned" and that it "does not feel at liberty to disturb that decision which has been acted upon for nearly fourteen years." There is no evidence whatever in this record that the Kahilina decision has been acted upon for fourteen years or for any other period of time or at all. There is no evidence whatever that anyone either a party or not a party to that case has ever acted or omitted to act in reliance upon that decision. This is a submission upon agreed facts and no evidence of any kind has been introduced in the case. The statement of agreed facts contained not a word showing any reliance upon that decision by anyone. The only transactions in the property of this estate disclosed by the record are those of the deeds executed to the plaintiff in error and set forth on page 4 of this brief. There is nothing in any of these transactions to show reliance upon the majority opinion in the Kahilina case any more than they show reliance upon the minority opinion. Those sales, deeds and purchases to and by Mary Lucas are consistent with both the majority and minority opinions. Whether the interests of the sons and those of the daughters were vested or contingent they were assignable. Whether they were vested or contingent the grantors could well have regarded it as good business to sell and the grantee could well have regarded it as good business to buy. Whether they were vested or contingent, whether the condition named in Article "Third" was subsequent or precedent the grantee could well have

proceeded upon the theory that she could later acquire all outstanding interests and thus complete the title in herself. Those transactions indicate with as much clearness, no more and no less, that all of the parties to them regarded the dissenting opinion as worthy of attention as that they regarded the majority as conclusively and finally stating the law.

Nor is there any room for the presumption that the Kahilina decision has been so acted upon. That decision did not enunciate any principle capable of general application. All that was there held was that upon the language used in this particular will certain estates were devised; and before that ruling could be applied or acted upon with reference to property other than that derived under this particular will, the language would have to be substantially duplicated in some other will or deed,—something which is extremely unlikely to have occurred since the rendition of that decision.

Not only upon the facts but upon the law the doctrine of *stare decisis* cannot be successfully invoked in this case in aid of an adherence to the decision in the Kahilina case. In addition to the considerations already referred to, it is to be noted that the Kahilina decision stands alone in Hawaii in the announcement of the views there stated. Ordinarily the doctrine applies only when there has been a series of decisions to the same effect. The reason is that there is less likelihood of error when the subject has been many times considered and the same conclusion always reached. Again, the one decision was by a di-

vided court and by a bare majority of one. The Supreme Court of Hawaii consists and at that time consisted of only three members. Under those circumstances of a decision, the first upon the point, by a divided court and the bare majority of one, the thought naturally arises of the possibility of the majority having erred and business men should be and are more cautious in acting upon the prevailing opinion. Again, the maxim is not imperative, "not ironclad" as some writers express it. The court looks always to the greatest permanent good of the community which it is serving. Its effort always is to declare sound law only and it will not consciously follow an erroneous decision unless compelling reasons are presented why it should do so. It is not shown that any real-estate titles would be affected by departing from the views expressed in the Kahilina case and if the same liberty may be accorded us as was exercised by the court below, of going outside of the record, it may be said that we are unaware of any action having been taken in Hawaii upon reliance upon the majority opinion in the Kahilina case and that we believe none such has been taken. Further, the point decided in that case is a controverted one and one upon which something can be said upon both sides. Again, the point now before the court was not before the court in the Kahilina case. The court was not then asked to consider and did not consider just what the condition in Article "Third" of the will was, or what the correct definition of "surviving" daughters was or who the

non-shortcoming sons were, or whether the heirs of a daughter who died before the expiration of the lease were entitled to $5000, or whether the non-shortcoming sons were obligated to pay to such heirs. A consideration of all of these points is inevitably involved in the determination of the nature and in the proper classification of the estates devised to the daughters and to the sons respectively.

In support of our contention of the inapplicability of the doctrine of *stare decisis* under the circumstances, see for example:

11 Cyc. 745, 755, 756;
26 A. & E. Ency. 166-168;
Young v. Downey, 150 Mo. 331.

For all of the foregoing reasons, it is submitted that there is no duty whatever to follow the decision in the Kahilina case in so far as the doctrine of *stare decisis* is concerned.

The claim that "no question can now be raised as to the kind of interest which Catherine took under the will" because already decided in the Kahilina case is unfounded. In the Kahilina case neither Christian, one of our grantors, nor Catherine herself nor Beatrice was a party. Catherine was not bound by the decision, her heirs were not bound and we are not bound. The Kahilina case is not *res judicata* in this case. The question as between vested interests and contingent interests is open in so far as that point is concerned, but is, as will be argued later, immaterial.

3.

THE MAJORITY DECISION IN THE KAHILINA CASE WAS INCORRECT.

The devise to the daughters was not of a vested estate upon a condition subsequent but, with the sons, of alternative contingent remainders upon a condition precedent.

In the first place, even if viewed as vested, the estate devised to the daughters is, as pointed out by Chief Justice Robertson in his dissenting opinion in this case, a conditional limitation rather than an estate upon condition subsequent. The distinction between the two classes of estates is clear. In a conditional limitation the happening or failure to happen, as the case may be, of the condition marks immediately and of itself the termination of the estate granted or devised; whereas, in an estate upon a condition subsequent the mere happening or failure to happen of the condition does not defeat the estate. It still remains optional with the grantor or his heirs or the heirs of the testator to take advantage of the breach of the condition and to enforce the defeat of the original estate and the reverter to the grantor, his heirs or the heirs of the testator as the case may be. The provision for re-entry is, therefore, the distinctive characteristic of the estate upon condition subsequent. The right of re-entry or possibility of reverter always remains or continues in the grantor or his heirs or in the heirs of the devisor where the grant is of an estate upon a condition sub-

sequent. That is not true of a conditional limitation. Nothing remains in the grantor, and upon the happening of the event named the first estate terminates and the second begins. See for example:

2 Wendell's Blackstone, 155, 156;
16 Cyc. 607;
6 A. & E. Ency. 504;
Church v. Grant, 3 Gray 142, 147, 151;
Attorney-General v. Merrimac Co., 14 Gray 586, 612.

In the second place, it is submitted that under a correct construction of the will the daughters like the sons were given contingent remainders or executory devises by way of contingent remainders, contingent (a) upon their surviving the expiration of the 25-year lease and (b) in the case of the sons, upon their paying to each of the surviving daughters $5000, and in the case of the daughters, upon the sons not paying within one year from the expiration of the lease the sum of $5000 to each surviving daughter; that, in other words, if the sons or one or more of them survived and paid as just stated they would have all of the lands, and, if they did not survive or did not pay, then they jointly with the daughters would receive one-ninth each in the lands, and as to the daughters, if the sons survived and paid, they (the daughters) would have $5000 each and no more, and if the sons did not survive or did not pay then the daughters jointly with the sons would receive one-ninth each.

For the moment the question of precisely what the condition or contingency was upon whose happening or failure to happen the alternative contingent remainders or executory devises were respectively to take effect may be passed by.

An examination of the will (Tr., p. 19) will show that its provisions were substantially as follows: After reciting the fact that all of his lands excepting a parcel of 100 acres and another parcel of 2 acres had been leased by the testator to the Kilauea Sugar Company at a rental of $6000 per year for the term of 25 years commencing November 1, 1890, and ending November 1, 1915, he gave in Article "First" to his widow a life rent of $2000 or one-third of the net income received under the 25-year lease and to each of his children an equal share of the remainder of $4000 or of two-thirds of the yearly rent under the lease in question. In Article "Second" he divided the hundred-acre tract among his widow and his nine children. In Article "Third" (Tr., p. 22) the testator declared that it was his "sincere wish and will" that "at the expiration of the 25 years lease with the Kilauea Sugar Co." his lands should "befall in equal shares and interest" upon his three sons "or then surviving sons or son." Here is a direct devise of all of the lands to the sons, but upon the contingency that in order to take under that devise the son or sons so taking should survive the expiration of the 25-year lease. The use of the word "then" in the expression "then surviving sons or son" places beyond doubt that the survivorship must be of the 25-year

lease. To those only of Frank, Henry and Christian who survive that period is the devise of all the lands made but the devise is based upon the further contingency that "at such a time," meaning at the expiration of the 25-year lease, "these my sons or son" shall pay "to each one of my daughters or surviving daughters the sum of $5000." The additional proviso is made that if one or two of the sons should be "at that time or within a year from that time," meaning at the expiration of the lease or within a year thereafter, unable to pay his share of the sum of $5000 "to each one of my daughters or surviving daughters" the remaining two or one of the sons, meaning those with ability and willingness to pay, should have all of the lands by paying to each of the "daughters or surviving daughters" and to each of the "shortcoming son or sons" the same amount of $5000. The testator adds in the same article that "by doing so they my sons or he my son will enter into full possession of all my lands; and their or his right and title will be undisputable, provided they or he (my sons or son) comply and fulfill the above mentioned conditions." It is submitted that all of this is a clear statement that if one or more of the sons survive the expiration of the lease and are able and willing to pay the sum stated to each of the "surviving daughters" and to each of the shortcoming sons, they (the paying sons) are to have all of the lands by direct devise from the testator and that, in that event, the daughters and surviving shortcoming son or sons are to have $5000 and nothing else.

In Article "Fourth" (Tr., p. 23) the testator says that "should none of my sons be able to pay these amounts" then his lands are to be sold or leased and the proceeds are to be "equally divided amongst my children or their lawful heirs and assigns" after the widow's dower has been secured to her. By this article the provisions of Article "Third" are supplemented. The alternative contingent remainder is thereby stated that if none of the sons survive or if none of those surviving the expiration of the lease pay the required sums of $5000 each then all of the nine children (and the heirs and assigns of any deceased child by way of representation) are to take an undivided one-ninth each in the lands or their proceeds. The devise stated in paragraph "Fourth" is based upon the two contingencies of survivorship and payment or non-survivorship and non-payment, as the case may be, upon which the devises in Article "Third" are based.

A remainder is contingent "when it is so limited as to take effect to a person * * * not ascertained or upon an event which may never happen." *Woodman v. Woodman,* 89 Me. 128. In the case at bar it was impossible upon the death of the testator to ascertain which one or more, if any, of the sons would be alive at the expiration of the lease. There was entire uncertainty at that time not only as to what one or more of the sons would have the right to the enjoyment of the estate, but also as to whether any of them would have that right. It was also impossible upon the testator's death to know whether

any one or more of the sons would be able and willing to pay at the time named.

If the period of survivorship referred to in the expression "surviving daughters" is the expiration of the lease, a point to be considered hereinafter, then there is to be found as to the devises to the daughters an additional contingency. If a daughter survives and one or more of the sons pays, then that daughter takes $5000 and nothing else. If a daughter does not survive the expiration of the lease, then even though one or more of the sons are able to pay she is not entitled to $5000.

If it be suggested that the remainder to the daughters and to the sons must be held to be vested rather than contingent on the theory that no disposition of the land is otherwise made for the period prior to the expiration of the lease, the answer is that by the first clause of the will all of the income of the land for the period of the lease is disposed of to the widow and children in stated proportions and that this is the equivalent of a devise of the land itself for that time,—an estate for years.

See 3 Washburn Real Prop. (4th Ed.) 382;
Earl v. Roe, 35 Me. 414, 419;
Reed v. Reed, 9 Mass. 372, 373;
Caldwell v. Fulton, 31 Pa. St. 475, 479.

Whether a condition is to be deemed precedent or consequent depends upon what the intent of the testator was. Classifications of estates are made after we learn what the intent of the testator was and the

intent is not to be found from preconceived classifications. The conditions mentioned in Article "Third" are clearly precedent. As to the sons, the testator himself says that "by doing so, they my sons or he my son will enter into full possession of all my lands and their or his right and title will be undisputable." That is, the sons must first do what is required of them in the condition before the devise operates in their favor and before the estate becomes vested in them. So also on the other hand, the sons must first fail to pay and otherwise perform the condition before it can be known whether the daughters are to take $5000 only or are to take one-ninth each of the lands. "Should none of my sons" be able to pay, then each of the nine children is to get one-ninth, says the testator in Article "Fourth,"—another indication that as to these nine children and the estate granted to them by Article "Fourth" the condition of non-performance by the sons is to be precedent. It is submitted that there is no indication in Article "Third" or in Article "Fourth" or elsewhere in the will that each of the children is given at the testator's death a one-ninth interest subject to possible defeasance later.

If, because of the possible intervention of the period of one year or of part of a year between the determination of the particular estate for years devised in the first article and the vesting of the interests of the sons or of the daughters or both in the land, the devises cannot under the precedents be properly regarded as contingent remainders they can

certainly be given effect as executory devises by way of contingent remainders.

See 4 Kent Com. (13th Ed.) 264 et seq.; 269;
1 Bouvier's Dict. (Rawle's 3rd Revision) 1151;
2 Underhill on Wills, Sec. 874 et seq.

In the interval, if any, between the determination of the particular estate and the taking effect of the limitation over the fee would be in the testator's heirs.

The use of the word "buy" in Article "Third" should not, it is submitted, be regarded as showing that the estate in the daughters was vested or that it would pass from the daughters to the paying sons. The remaining language of the will is more than sufficient to counterbalance the effect of the word "buy" if it stood alone. The testator has plainly said that it is his will that his lands "shall befall" upon his three sons. The lands are to go to the sons, not from the daughters, but directly by devise from the testator. The provision for payment of $5000 by the sons to the daughters was simply the testator's way of carrying out his wish that the daughters should have $5000 each and that the sons should have the lands.

Nor does the statement in Article "Fourth" that the "lawful heirs and assigns" of any deceased child of the testator are to have under Article "Fourth" a share of the lands militate against our contention that the remainders are contingent and not vested.

The word "heirs" is used there as a word not of limitation but of purchase; and as to the word "assigns" contingent remainders are assignable as well as vested remainders. The attention of the court is respectfully called to the dissenting opinion in the Kahilina case. It is submitted that it correctly states the law and correctly construes the will in the respects then under consideration.

4.

IMMATERIAL WHETHER DEVISE TO DAUGHTERS WAS OF A VESTED OR A CONTINGENT REMAINDER OR A CONDITIONAL LIMITATION.

It is in reality immaterial to the determination of the questions at issue in this case whether the devise to each of the daughters in Article "Third" is of a vested estate upon condition subsequent or of a contingent remainder (or executory devise by way of contingent remainder) or of a conditional limitation. Whether the correct construction is that adopted by the majority in the Kahilina case that each child took a present vested remainder in fee defeasible as to the interests of the daughters and as to any shortcoming son or sons upon the performance of the prescribed conditions by the other son or sons, or is that contended for by us that each of the daughters as well as each of the sons took a contingent remainder or executory devise by way of contingent remainder, in either event contingent

upon survivorship and upon payment as above stated, or is that suggested by Chief Justice Robertson that the estate to each of the daughters is a conditional limitation not defeasible but terminable upon the happening of the contingencies named, the result is the same. For whichever one of these views or classifications is adopted, the contingency or condition named in Article "Third" is all of the time one and the same condition; it means all of the time one and the same thing. Under the theory of the defendants in error and of the majority of the court below, the condition is a condition subsequent. Under our claim it is a condition precedent. Under Chief Justice Robertson's view it is, strictly speaking, neither precedent nor subsequent but is simply an event or series of events which marks the termination of the estate devised to the daughters. But whether it is a condition subsequent or a condition precedent or a contingency or condition marking the termination of one estate and the beginning of another, it is all the time one and the same condition. It cannot possibly be that if it is held to be a condition subsequent it must be held that the testator meant by it one thing; and that if it is held to be a condition precedent it must be held that the testator meant by it another thing; and that if it is held to be one of the terms of a conditional limitation, it must be held that the testator meant by it still another thing. The testator certainly meant one thing only when he prescribed the terms of that condition. He did not stop

to consider in legal terms whether he was creating a condition subsequent, a condition precedent or an element of a conditional limitation. He was simply defining what it was that should happen in order that his "sincere wish and will" might be carried out that all of his lands should "befall" upon his sons or son. To first say that the estates created were vested and then to argue that courts will hesitate to put into effect a condition of defeasance and that this is a condition of defeasance is, we submit, to put the cart before the horse, to decide the case first and to find the testator's intention afterwards. The only correct course is to determine from the language of the will what this and other provisions mean and then in accordance with these conclusions to classify the estates given and to see whether they are vested or contingent. Even the majority in the Kahilina case held that the estates which it regarded as vested would be divested upon the performance by the sons of the condition contained in Article "Third." The only question is, What is that condition? What is it that the sons are required to do? To what daughters were they required to pay? Who are the "surviving daughters" to whom they are required to pay? Surviving when? At the death of the testator or at the time of distribution, to wit, at the expiration of the lease? All of this, we submit, can be answered without consideration of the issue as to vested or contingent remainders, executory devises and conditional limitations.

5.

WORDS OF SURVIVORSHIP — RULES OF CONSTRUCTION — TO WHAT PERIOD REFERRED.

General so-called rules of construction are often considered in the construction of wills. As to what these rules are, there can be but little if any dispute. We do not understand that they will be disputed in this case. The leading principle, of course, is that it is the intention of the testator which is to be sought by court and counsel. A will is a statement of the desires of the testator with reference to the final disposition of his property at and subsequent to death. What a testator intended by this or that provision is, therefore, very properly the most important matter to be considered and declared in the construction of his words.

We appreciate that as stated in some of the reported cases, rules of construction are mere aids to the ascertainment of that intention and that when they fail to give that aid, when on the contrary their adoption would merely serve to construe the language in a way which would frustrate the intention of the testator, then the so-called rules should be rejected and not applied; and yet many instances have occurred where those rules should be applied in spite even of minor differences in the wording of the wills under consideration. Had there not been many such cases in history, the rules themselves would never have been formed or stated. They grew out

of the experience of the courts that when testators made certain provisions or used certain expressions they usually meant this, that or the other thing as the case might be. The will in the case at bar is, we submit, one of the latter class to which a rule of construction often applied heretofore in other wills properly applies. Reference is here made to the rule relating to the construction of words of survivorship. Many cases decided upon that subject will be found to be helpful.

The general rule which we contend for is that where a gift is given to the "surviving" children, sons, daughters, brothers, sisters, or other relatives as the case may be, and that gift is preceded by a particular estate for life or for years, the words of survivorship in the absence of anything in the will indicating a contrary intention refer to the termination of the particular estate, such as at the death of the life tenant or at the end of the period of years named.

"Words of survivorship will be referred to the event plainly intended to accomplish the purpose of the testator, whether that event be before, at the time of, or after the death of the testator. As a general rule, words of survivorship in a will, particularly when used in connection with an immediate gift, refer to the death of the testator as the time at which the survivorship will be determined, unless it clearly appears from the context and surrounding circumstances that the testator intended to refer it to another time, after his death. But where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship, in the absence of anything indicating a contrary intention,

usually refer to the termination of the particular estate, such as at the death of the life-tenant, although it has been held that even in such cases the survivorship is determined at the death of the testator." 40 Cyc. 1511, 1512.

"The later English cases * * * have adopted the rule that whether the gift be immediate or postponed and whether the property be real or personal, words of survivorship *prima facie* refer to the period of division. If there is no previous interest given, the period of division is the death of the testator and survivors at his death take the whole; but if a previous life estate be given, then the period of division is the death of the life tenant and survivors at such death take the whole. To the same effect is the weight of authority in the United States." 30 A. & E. Ency. 809.

"The testator devised his dwelling house to his wife for her life, and added, 'that on her decease, I give and devise the same to my surviving children, to be divided equally between them.' Five children survived the testator, but only two survived the wife; and the question is whether the word 'surviving' relates to the time of the testator's death or to that of his wife's death. According to the natural use of language, it has reference to the latter event. It is placed in close connection with her decease. No reference is made to the time of his own death in any part of the will. The word 'surviving' would be unnecessary and meaningless if he meant to give the remainder of the estate to all of his children. The children surviving on her decease must be taken to be the devisees intended." *Coveny v. McLaughlin,* 148 Mass. 576, 7, 8.

"In this will, it is perfectly clear, that the testator intended to give to his wife the improvement of his farm, during her life or widowhood" (in the case at bar the testator, it is perfectly clear, intended to make for his wife and children during the period of the existence of the lease the provision which is set forth in Article "First" of the will) "and having

carved out this estate for her, he gave the remainder to his surviving sons" (and having carved out, in the case at bar, the temporary provision set forth in Article "First" to be good until the expiration of the lease, he gave the remainder to his surviving sons as prescribed in Article "Third"), "to be equally divided between them. Had he given generally to his sons, all who happened to be alive at his decease, viz., all who survived him, would have taken. This construction the demandants contend for. But if 'surviving' meant those who outlive the mother, then, as one only survived her, he took the whole estate, which the tenant now holds under him. Perhaps the reason of the preference which the law gives to vested over contingent remainders, could not be better illustrated than in this case. As several of the sons had families and left children, justice would seem to require, that these grandchildren should partake of their ancestor's bounty rather than that the whole should go to one child to the exclusion of all the other children and grandchildren. This certainly is a strong reason to influence the mind *of the testator*" (the italics are ours) "to induce him to give vested rather than contingent remainders. And it may lawfully and properly influence our mind in cases of doubtful construction; because we should suppose it more probable, that the testator intended the one than the other. But it can never authorize us to make a will for him. He says, 'should my wife marry or die the land *then* shall be equally divided among my surviving sons.' The time when the estate was to be divided among the sons is certain and definite. It was when the intermediate estate terminated by the death or marriage of the tenant. Among whom was it to be divided? Not those who survived any prior event, not those who survived the father; but those who survived that particular event, those surviving the death or marriage of the widow.

"Had the testator intended to give to the sons who were alive at his own death, he would have said, 'my sons who survive me, or whom I may leave, or who

shall be alive at my decease,' or, if he had given to his sons generally the effect would have been the same. * * *

"The provision that each son should pay the daughters sixty dollars, on coming into possession, cannot have much tendency to show, that he intended to give a vested remainder. No doubt he expected, that the sons would survive the mother, at least, more than one of them, and that the daughters would receive a much larger sum than sixty dollars. But it cannot be inferred, that he intended the heirs of the deceased sons should take portions; because if he had, it must be presumed, that he would have required the sons' heirs, as well as the sons themselves to pay the sixty dollars to the daughters." (In the case at bar the will in this respect is even clearer for the testator expressly says that the land shall befall only upon the "then" surviving sons and that they only shall be required to pay the sums of five thousand dollars.) *Olney v. Hull,* 21 Pick. 311, 313-315.

"Where there is a gift to children for life, and, as each child dies leaving issue, a gift of the share of the child so dying to the issue of that child, with a gift over to surviving sons and daughters of the testatrix if the life tenant dies without issue, the surviving sons and daughters are the sons and daughters who survive the life tenant who dies without issue. This is usually the meaning of these words." *Dary v. Grau,* 190 Mass. 482, 486.

"The question to what period survivorship is to relate must depend rather upon the apparent intention of the testator in each case than upon any rigid rule. Here were two separate life estates, preceding the time for distribution, the various legacies to persons from the principal of the fund were to be paid only in case the legatees named should survive the testator's wife. The testator had in mind in these clauses a later period of survivorship than his own death. All the residue of said trust fund, which was finally to be divided, was what should be left after the end of both of the life estates, and after

the payment of all of the specific sums to the different persons and societies named. This residue was not ascertainable until the time came for its distribution." (In the case at bar, there is absolutely no room for doubt, as will be pointed out hereinafter, that the time for distribution was the expiration of the lease.) "The word 'surviving' more naturally relates to that time when the residue was to be ascertained and distributed. * * * This gives effect to the word 'surviving.' * * * The rule that the law leans towards vested remainders always yields when a contrary intention of the testator is to be gathered from the fair construction of the whole will; and where the question is to what period words of survivorship shall be referred it is often more reasonable to suppose that the testator meant the period of distribution." *Denny v. Kettell,* 135 Mass. 138, 139, 140.

"It is now well settled in this state as a rule of general application to the construction of wills that when a gift is made for life and then over to survivors the period of survivorship is to be referred to the period of distribution and not to the death of the testator" (citing authorities), "but the testator may if he choose fix otherwise the period of vesting; and when he has fixed upon the happening of a contingency the estate will not vest until such contingency happens." *Ridgely v. Ridgely,* 100 Md. 230, 233.

"The last proposition depends upon whether the words 'my surviving children' mean those living at the death of the testatrix or those living at the end of the particular estate. The use of that term 'surviving children' is very common in wills and the question whether it means children surviving at the death of the testator, or at some other period, has been much discussed and variously decided, but in every case the decision has aimed to meet the intention of the testator in the particular will as such intention is gathered from the whole will and the circumstances to which it applies. No unvarying rule can be laid down for the interpretation of those

words or words of similar meaning, but, subject to exception, when the facts of the particular case require it, the general rule is that if an estate is given by will to the survivors of a class, to take effect on the death of the testator, the word 'survivors' means those living at the death of the testator, but if a particular estate is given and the remainder is given to the survivors of a class, the word 'survivors' means those surviving at the termination of the particular estate.

"There is a learned discussion of this subject in each of the briefs with which we are favored and authorities are there collected and cases discussed. But we do not think it would profit to attempt to review the authorities referred to, since this court has in at least two cases gone over the whole field and laid down the rule as we have above stated it. (*DeLassus v. Gatewood,* 71 Mo. 371, and *Dickerson v. Dickerson,* 211 Mo. 483.)" *Sullivan v. Garesche,* 229 Mo. 496, 506.

In *Dickerson v. Dickerson,* 211 Mo. 483, 486, 496, the devise was:

"If she marries or ceases to be my widow, the farm then reverts to my children, to be equally divided between them, and at her death said farm to be divided between my surviving children, and grandchildren if any whose parents are dead. * * *

"The foregoing construction is borne out by asking the question, when is the farm to be divided? The will says at the widow's 'death.' Among whom is it to be divided? According to the will 'equally divided between my surviving children, and grandchildren if any whose parents are dead.' Surviving when? At the time the division of the estate is to be made—that is, upon the marriage or death of the widow."

"To what time does the word 'survivors' relate—to the time of the death of the testatrix, or that of Mary H.? The English and American cases bearing upon this question were considered in *Hill v. Bank,*

45 N. H. 270, and the conclusion reached was stated in these terms:—'If there be a bequest to one for life, and then to the children of the testator or the survivors of them, those children will take who, at the death of the tenant for life, answer the description in the will, to the exclusion of the representatives of those who are then dead. This, we think, is the rule when the bequest is in these terms and nothing more; subject, of course, to be controlled by a manifestation, in the will, of a different intention.' In that case the fund was to be equally divided among the testator's living children after the decease of his widow, who had the interest of it during her life; and it was held that the natural and obvious meaning of the terms, as well as the established rules of law, gave the fund to the children living at the time of distribution. The court say: 'To include the children of a son deceased before the death of the tenant for life, would be making the will speak language which was not used by the testator and not implied by the general tenor of the instrument.' * * *

"The natural significance of the language is that those of the persons named who should be living at the death of Mary—the time when the distribution is to be made—are the survivors referred to. The event upon the happening of which payment is to be made is expressed, and the survivorship mentioned obviously relates to it. Upon Mary's death the remainder is to be paid to the persons named or the survivors of them at that time. The meaning is not changed by regarding the words as speaking as of the date of the death of the testatrix. The survivorship cannot be referred to that date without drawing an inference that conflicts to some extent, at least, with the natural meaning of the language used. Besides, if such had been the intention, other words would naturally have been used, as, for example, 'those who survive me.'" *Hall v. Blodgett,* 70 N. H. 437, 439, 440.

"The only remaining question is, who are meant

by the terms 'my surviving legatees,' found in the second clause of the will, and used to designate the persons who were to take in the event which has happened,—the death of Rocinda without issue. The question is whether those terms mean the legatees who survived the first taker, Rocinda, upon whose death without issue these survivors were to take. This question is conclusively answered by the authorities. In 2 Jarm. Wills (Perk. Ed.) 462, the author, after citing and commenting upon the cases, says: 'In this state of the recent authorities, one scarcely need hesitate to affirm that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred; and that, where such gift is preceded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution, and of those only.' It is true that the learned author calls attention to the fact that some of the cases forbid the application of this rule to devisees; but he adds that 'it is difficult to discover any ground for making them the subject of a different rule.' * * *

"'Where such gift is preceded by a life *or other prior interest,* it takes effect in favor of those who survive the period of distribution, and of those only.' The words italicized in this quotation show very clearly that the rule is not confined to cases where the precedent estate is a life estate, but embraces cases of any other prior interest. So, in the case of *Presley v. Davis,* 7 Rich. Eq. at page 107, Wardlaw, Ch., in stating the rule, says:—'If the enjoyment be postponed by the interposition of a particular interest, such as a life estate, or by fixing a future period for division, such as the attainment of the legatee to full age, then words of survivorship more naturally relate to the period of division and enjoyment'; showing very clearly that it is not the nature of the preceding estate which gives rise to the rule, but that it grows out of the fact that a future period of distri-

bution is contemplated. And as said by the said chancellor in *Ballard v. Connors,* 10 Rich. Eq. at page 392: 'Where the enjoyment of the estate by those ultimately entitled is absolutely postponed to a future day by a supervening estate, it is natural and just to make the chances of survivorship applicable to such future day.' He does not say a 'supervening life estate,' but a 'supervening estate,' which would include an estate other than a life estate." *Selman v. Robertson,* 24 S. E. (S. C.), 187, 191.

"The weight of authority seems to be, that where an estate is granted to a class of persons described as survivors, such estate does not usually vest until the time designated for the beginning of the enjoyment of the estate by that class of persons; and the word 'survivorship,' or 'survivors,' as, in such case, refers to that period." *Cheney v. Tesse,* 108 Ill. 473, 482.

There are many other cases to the same effect, all of them based on the reasoning that in the absence of any language showing a contrary intention the rule as above stated gives effect to the natural and ordinary meaning of the words and to what obviously was the intention of the testator,—that if the testator had meant in any given will to refer the survivorship to the date of his own death, he would have used some expression tending to show that intent, as, for example, "those of my children who shall survive me" or "those of my sons (or daughters) who shall be living at my death." Simple language can always be easily found to express such intention where it exists. See, for example, the following cases:

Lawrence v. Phillips, 186 Mass. 320, 322;

Holcomb v. Lake, 24 N. J. L. 686, 7, 9, 690;

Biddle v. Hoyt, 54 N. C. 159, 163, 164;
Hawke v. Lodge, 77 Atl. (Del.) 1090, 1091;
In re Winter, 114 Cal. 186-190;
Blatchford v. Newberry, 99 Ill. 11, 40-45;
Hill v. Bank, 45 N. H. 270-273;
Hulburt v. Emerson, 16 Mass. 240, 243, 244;
Von Tilburgh v. Hollinshead, 14 N. J. Eq. 32, 33-35;
Williamson v. Chamberlain, 10 N. J. Eq. 373, 5, 6;
Sinton v. Boyd, 19 O. St. 30, 35;
In re Baer, 147 N. Y. 348, 353;
Ridgeway v. Underwood, 67 Ill. 419, 424, 5;
2 Williams on Executors (7 Ed.), 1575, 1576.

6.

DEVISE TO INDIVIDUAL—DEATH BEFORE TESTATOR—LAPSE.

"The general rule is that a legacy or devise will lapse where the legatee or devisee dies before the testator. And the same is true where he dies after the testator but before his interest under the will has vested." 18 A. & E. Ency. 748, 749.

"At common law, in the event of the death of a beneficiary before the testator, the devise or legacy lapsed." 40 Cyc. 1514.

This rule is so well established that we will not do more than to cite a few of the authorities declaring it.

Jackson v. Alsop, 67 Conn. 249, 251;
Collins v. Collins, 126 Ind. 559-561;
Stetson v. Easton, 84 Me. 366, 8, 9;

Kimball v. Story, 108 Mass. 382, 4;
Claflin v. Tilton, 41 Mass. 343, 4;
Goodwin v. Colby, 64 N. H. 401;
Re Kimball, 20 R. I. 619, 623;
Dixon v. Cooper, 88 Tenn. 177, 182;
Watkins v. Blount, 43 Tex. Civ. App. 460, 462;
1 Jarman Wills (Bigelow's Ed.) top page 338;
2 Redfield on Wills, page 484.

This rule and these authorities are cited merely because the underlying principle is the same as that in cases of devises to a class treated in the next point herein. In either class of cases the failure to survive the testator causes a lapse.

7.

DEVISE TO A CLASS—DEATH BEFORE TESTATOR—SURVIVORS TAKE ALL.

If the devise is to a class, the members of the class who survive the testator take the whole legacy. Where, therefore, the intention is to make the devise to daughters as a class or such of them as shall survive the testator, it is sufficient to express the gift as being to the daughters without specifying "surviving" daughters. In other words, if, in the case at bar, the testator's intention was to make the five thousand dollars payable to each daughter who should survive *him* it was unnecessary to say "surviving" daughters. It would have been sufficient to say "daughters," for that, in the absence of language to the contrary, would necessarily have been con-

strued as daughters surviving at the testator's death.

"Had he given generally to his sons all who happened to be alive at his decease, viz., all who survived him, would have taken. * * * Had the testator intended to give to the sons who were alive at his own death, he would have said 'my sons who survive me or whom I may leave or who shall be alive at my decease.' Or if he had given to his sons generally, the effect would have been the same." *Olney v. Hull,* 21 Pick. 311, 314.

"It is a familiar rule that a gift to a class to take effect immediately upon the testator's death includes only those who are living at that time." *Martin v. Trustees,* 25 S. E. 522, 523.

"In cases of gifts to a class as tenants in common the shares of members of the class dying before the testatrix do not lapse but go to the other members of the class." *Gordon v. Jackson,* 58 N. J. Eq. 166, 170.

"Without statutory intervention or express testamentary direction, it is entirely settled that upon the death of a legatee before the testator, the share which would have gone to such legatee, if he had survived the testator, falls into the residue.

"In the case of a gift to a class where upon the death of one or more of the members of the class before the testator, the remaining members will take the entire gift equally, no lapse occurs unless all the members of the class predecease the testator.

"Thus says Mr. Jarman, 'If property be given simply to the children or to the brothers and sisters of A equally to be divided between them, the entire subject of a gift will vest in any one child, brother or sister, or in any larger number of these objects surviving the testator, without regard to previous deaths.'—1 Jarman Wills, Sec. 311." *Trenton Co. v. Sibbits,* 62 N. J. Eq. 131, 132.

"It is a devise to a class. A class is a number of

persons or things ranked together for some common purpose * * * and when a legacy is to a class, all those will take who are embraced in the class at the time the legacy takes effect in point of enjoyment." *Mitchell v. Mitchell,* 73 Conn. 303, 307.

"It is a general rule of construction that where a legacy is given to two or more persons nominatim to be equally divided among them and one of them dies before the testator, his share will become intestate; but where the legacy is to two or more as a class, the share of a deceased legatee goes to the survivor or survivors." *Bolles v. Smith,* 39 Conn. 217, 219.

See also

30 A. & E. Ency. 718, 719;

40 Cyc. 1514, 15.

8.

CONSTRUCTION OF WILL OF BERTELMANN —WHAT THE CONTINGENCIES STATED IN ARTICLE "THIRD" ARE. "SURVIVING DAUGHTERS" MEANS THOSE SURVIVING AT THE EXPIRATION OF THE 25-YEAR LEASE.

Coming now to the will itself, the first article makes provision for the various members of the testator's family for the period of the life of the lease to the Kilauea Sugar Company. At the time of the execution of the will about twenty-four years of the term of the lease remained unexpired. About twenty years remained unexpired at his death. The lease reserved a rental of six thousand dollars per annum and the provision was that the widow should have out of this rent $2000 yearly, that each of the children should have an equal share of the remaining

$4000 and that in the event of any change in the rental the widow should have one-third and the children in equal shares the remaining two-thirds of the substituted rental; and further that in the event of the death of the widow prior to the expiration of the lease, her one-third of the rental should be added to the children's two-thirds. The article marked "Second" dealt solely with the disposition of a certain tract of one hundred acres not covered by the lease to the Kilauea Sugar Company, which tract is not referred to in the portions of the will directly involved in this case. Articles "Third" and "Fourth" (Tr., pp. 22, 23) read as follows:

"Third. At the expiration of the 25 years lease with the Kilauea Sugar Co. it is my sincere wish and will that my lands shall befall in equal shares and interest upon my three sons: Frank Charles, Henry Godfrey, and Christian Sylvester Bertelmann or then surviving sons or son. Provided however that at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand Dollars $5000.00. In case one or two of my sons should be at that time, or within a year from that time unable to furnish, produce or raise the necessary amount to pay to each one of my daughters or surviving daughters his share of the $5000.00 per capita, the two or the one of my sons will have a right to buy the whole of my lands now leased to the K. S. Co. by paying:

"1° to each of my daughters or surviving daughters the amount aforesaid of $5000.00.

"2° to my shortcoming son or sons the same amount of $5000.00 each, being the same share as will be paid to my daughters. By doing so, they my sons or he my son will enter in full possession of all my lands; and their or his right and title will be undisputable,

provided they or he (my sons or son) comply and fulfill the above mentioned conditions.

"3° To my wife Susan Bertelmann a life rent of $2000.00 per annum. I make the payment of all these amounts above given a charge upon all my estate.

"Fourth. Should none of my sons be able to pay these amounts, then my lands will be sold at public auction, or leased over again according to circumstances and best advantage of my family. The money deriving from said sale or lease will be equally divided amongst my children or their lawful heirs and assigns after the distributive share of dower will have been given to my wife Susan Bertelmann according to law."

There is nothing in the remaining articles of the will which can throw any light upon the questions under consideration.

Articles "Third" and "Fourth," it is submitted, are alternative provisions. If the sons do certain things in Article "Third" stated, the devise is to be as set forth in that article, but if the sons do not do those things, then the devise is to be as set forth in Article "Fourth." What are those things which they are to do? is one way of stating the main question now before the court. It is always profitable in will cases to read the will first much as a layman would do and endeavor, without reference to precedents, to learn the intention of the testator. So reading this will, there can be, it is submitted, no doubt as to that intention upon the point now under consideration. The testator says that it is his will that "at the expiration of the 25 years lease" his lands "shall befall" upon his three sons, Frank,

Henry and Christian, "or then surviving sons or son" with a proviso that "at such a time these my sons or son shall pay to each one of my daughters or surviving daughters the sum of five thousand Dollars $5000.00." In the first place, it is clear that any contention that the testator intended to treat all the children alike would be utterly unfounded and in conflict with his express words. (a) He certainly intended to favor the sons as against the daughters in the matter of the devise of the lands. It was to the sons and not to the daughters that he devised all of the property mentioned consisting of all of his property leased to the Sugar Company and all of the lands which he owned other than the hundred acres and two acres of taro patches. To be sure he provided a gift of five thousand dollars to each daughter but the lands themselves nevertheless were to go to the sons. (b) He favored the "then" surviving sons or son as against the sons or son not "then" surviving. There is simply no room for argument on this latter point. The language is too unambiguous to permit it. Whatever period of time the "then" refers to, the surviving sons alone were to receive the lands and the non-surviving sons were to receive not only no interest in the lands but no payment of five thousand dollars or any other sum. "Shortcoming heirs of any deceased son" or "heirs of any shortcoming son" are mentioned nowhere in the will.

The "then" used in the words just quoted clearly refers to the expiration of the 25 years' lease, to wit, November 1, 1915. In various ways does the lan-

guage of the testator show this and in no way is it contradicted or doubt thrown upon it. The statement is that the lands are to befall upon the three sons "at the expiration of the 25 years' lease with the Kilauea Sugar Company." Prior to the use of the word "then" in the first sentence of Article "Third," no period of time had been mentioned other than the expiration of the 25-year lease. The proviso immediately following this sentence is that "at such a time," meaning clearly the only time thus far mentioned, the same expiration of the twenty-five-year lease, the sons shall pay "to each one of my daughters or surviving daughters" the sum mentioned. Then he proceeds, "In case one or two of my sons should be *at that time*" (referring again to the only time thus far mentioned, the expiration of the lease) "or within a year from *that time*" (again meaning the same period of time) "unable to * * * raise the necesary amount * * * the two or the one of my sons will have the right to buy the whole of my lands now leased to the K. S. Co. by paying" the amounts there stated. It was undoubtedly intended by the testator that this acquirement of title by the sons should occur only after the termination of the 25-year lease. This is stated in so many different ways in Article "Third" that there is no escape from that conclusion, and in addition the fact that in Article "First" provision had been made for the family for the period preceding the expiration of the lease lends added strength to the construction here contended for. What language can pos-

sibly be pointed to in aid of a construction that the period of survivorship *as to the sons* was any other than the expiration of the 25-year lease? None whatever. If the period of survivorship as to the sons was the expiration of the lease would it not be the natural thing for the testator to do to refer to the same period of survivorship as to the daughters? At the very least, it would be expected that if he meant to prescribe a different period of survivorship as to the daughters he would have used language clearly indicating that intention and purpose. No such distinction is expressed. On the contrary, it is submitted that the same time is referred to throughout Article "Third" as the time of survivorship of the daughters and that of survivorship of the sons. The words which are the ultimate subject of contruction in this case are to be found in the proviso "provided however, that at such a time these my sons or son shall pay to each of my daughters or surviving daughters the sum of five thousand dollars $5000.00." The time of the making of the payments is stated with perfect clearness. It is "at such a time * * * or within a year from that time," which can only mean at the expiration of the lease or within a year from the expiration of the lease. If that is the time of payment, then when the testator speaks of "surviving daughters" he must, in the absence of any language to the contrary, be regarded as meaning daughters surviving at the time of which he is speaking. That would be

the ordinary meaning of the language used and the grammatical connection points to that meaning.

It is true that as to the sons the expression is the "*then* surviving sons or son" and that as to the daughters the expression is "daughters or surviving daughters" without the use of the word "then," but it is also true that after once speaking of the "then" surviving sons the testator omits that word as though his meaning had already been made sufficiently clear and speaks of his sons as "these my sons or son" and "my sons," and later again "my sons," and still later "they my sons or he my son." In other words, having once made clear that his reference in this clause "Third" was to the sons or son who should be "then" surviving he deemed it unnecessary to repeat and repeat that one word. So also as to the daughters. The reference to them is practically in the same breath as the reference to the sons. It is immediately following and in connection with the reference to the "*then* surviving sons or son." Read grammatically, read in their ordinary natural meaning the first impression certainly is and the last impression ought to be that the testator meant daughters surviving at the period of time that the sons were required to survive. If the testator was attempting to make it known to the world in general and his family in particular that what he meant was that the sons who should be surviving at the expiration of the lease should make the payments to the daughters who were surviving at his own death, surely he would have employed language more apt to

express that thought. Without conscious effort it could very easily have been done.

It cannot be successfully contended that the fact that in Article "Fourth" the "heirs" of any deceased child is to take its parent's one-ninth of the lands shows that under Article "Third" the heirs of a daughter not surviving the expiration of the lease would take one-ninth of their ancestor's right to $5000. The testator *did* limit the right to the $5000 to his "surviving daughters." Those are his own words. Whether the period of survivorship was his own death or the time of distribution (the expiration of the lease), the fact of survivorship was made by the testator indispensable to the right to $5000. If a daughter did not survive the prescribed period, whatever it was, she could not get the $5000 and the sons need not pay it, and that, necessarily, irrespective of whether or not she left children or other heirs. The express limitation made by the testator, "*surviving* daughters," must be utterly disregarded if the words "or their lawful heirs or assigns" are imported from Article "Fourth" and grafted into Article "Third." Article "Fourth" does not limit its gift to "surviving daughters" or to "surviving children." The omission there of that limitation was entirely consistent with, if not demanded by, the desire to have the heirs of any deceased child take a share equally with each of the testator's living children and is in significant contrast with its presence in Article "Third."

It is submitted that the general scheme of the will

was this: First, to divide the income accruing during the term of the lease amongst the children and widow of the testator; secondly, to divide the hundred-acre parcel amongst the children and widow; thirdly, as to all of the other lands of the testator to give them to the sons who should be living at the expiration of the lease providing they should, at the expiration of the lease or within a year from that time, pay to each of the daughters surviving *at that time* and to each of the shortcoming sons surviving at that time the sum of five thousand dollars ($5000.00); and fourth, as to all of the same lands mentioned in Article "Third," to divide them or their proceeds amongst all of his children then surviving and the lawful heirs (by way of representation) of any dying before that time (subject to dower in favor of the widow). So regarded, the will is a consistent whole. The discrimination with reference to the $5000 payments, in favor of daughters living at the expiration of the lease and against those dying prior thereto, is an intentional discrimination and is the equivalent of the provision made in the case of the sons, the same discrimination being undeniably shown in favor of sons surviving at the expiration of the lease and against those not so surviving.

Let it be remembered in this connection that the provision for the payment of $5000 to each shortcoming son applies only in favor of each shortcoming son who shall be surviving at the expiration of the 25-year lease. Of this there can be absolutely no doubt. At the expiration of the lease, the lands are to befall

in equal shares "upon my three sons * * * or *then* surviving sons or son. Provided however that at such a time these my sons or son shall pay * * * In case one or two of my sons should be at that time or within a year from that time unable to furnish, produce or raise" the money, then the two or the one remaining may perform the conditions. Can this reference to sons who are to raise the money mean anything other than sons living at the expiration of the lease? Can this reference to sons who are unable to raise the money mean anything other than sons who are living at the expiration of the lease? Obviously not. The testator first says that his lands shall befall upon those only of his sons who survive "then," at the expiration of the lease, provided they make the $5000 payments. Having said that, he continues referring to the same class of sons, that is, those "then" surviving, and adds that if one or two of them are unable to pay then the others or other may pay to the daughters and to the "shortcoming son or sons." Certainy the "shortcoming sons or son" are those who, though they survived, yet were unable to pay. If the shortcoming sons entitled to receive $5000 can be those only who survive the expiration of the lease, what reason is to be found in the words of the will for holding that the provision as to the daughters entitled to receive the $5000 is any different,—that as to them they need not survive the expiration of the lease? Pure surmise and nothing else can be called to the aid of any

such theory. The words of the will are all the other way.

Thus far in this subdivision, the true construction has been sought without reference to the authorities. It is submitted, however, that the rule above contended for as having been applied in many other will cases, that, where the gift to the survivors is preceded by a particular estate for life or years, words of survivorship in the absence of anything indicating a contrary intention usually refer to the termination of the particular estate such as at the death of the life tenant, applies. We have here a gift of a preceding estate for years, to wit, until the end of the lease, and we have in addition a time expressly and unambiguously named for the performance of the condition, to wit, the expiration of the lease and one year thereafter. Had there been no gift of a preceding estate and were the condition to be performed at the death of the testator, an entirely different situation would have presented itself. The expressions in Article "Third" "at the expiration of the 25 years lease," "or then surviving sons or son," "at such a time," "at that time" and "within a year from that time," all support the view here contended for that the period of distribution in the mind of the testator in drawing Article "Third" was the expiration of the lease and are all inconsistent with the theory that the date of the death of the testator was the time for distribution. The substance and the nature of the successive provisions to be found in Articles "First," "Third" and "Fourth" all tend to

strongly support our contention in this respect. The survivorship referred to was to be measured as of the date of the expiration of the lease and not as of the date of the death of the testator. The lands were not to befall on the sons until the expiration of the lease. The payments were not to be made to the daughters until the expiration of the lease. When he spoke of "*then* surviving" sons, beyond any question he meant sons surviving at the expiration of the lease; and when he spoke of "surviving" daughters, all the indications in the will are that he meant daughters surviving at the same time. The general rule as to the construction of words of survivorship is applicable.

Because under Article "Fourth," the heirs of any child who shall not survive at the end of one year from and after the expiration of the lease would take land is not a reason for holding that under Article "Third" the heirs of a child not surviving at the expiration of the lease would take $5000 in her own right. The provisions are different. Their language is different. An essential term is expressed in the later one which is not expressed in the earlier one. Survivorship is not mentioned in the "Fourth." It is in the "Third." All sons and all daughters take under the "Fourth," while only surviving sons and daughters take under the "Third." All sons take land under the "Fourth"; only non-shortcoming sons take land under the "Third." Sons and daughters, "children," take alike under the "Fourth"; sons and daughters take differently under the

"Third." So also "heirs" take under the "Fourth," but do not take under the "Third." Each provision was intended to apply under a different set of circumstances. In each the substance of the provision is different. The testator himself made them different as he had a right to do. It is not for us or the court to endeavor to make the treatment of the children in the two cases more nearly alike (according to *our* judgment) in both cases. The circumstances are different, the treatment of the objects of his bounty is different, and the material words are different. The testator must be presumed to have used purposely the different material words in the two clauses.

The expression in Article "Third" "daughters or surviving daughters" means, it is submitted, that the gift of $5000 there mentioned was to go "to my daughters if they all survive but if they do not all survive, then to my surviving daughters,"—this irrespective of whether the period of survivorship referred to is the one or the other under consideration. Our opponents recognize that the gift of $5000 is to the "surviving" daughters only and that the duty which the sons owe if they wish to become undisputable owners is to pay to the "surviving" daughters only. That our opponents do recognize this is shown by the strenuous efforts made by them to have the period of survivorship construed to refer to the earliest possible time, that is, to the death of the testator, so as to bring the daughter Catherine within the class of "surviving daughters."

There is no rule of law or of construction which justifies the construing of the words of survivorship to refer to the earliest possible period in order to make as many daughters as possible come within the class of surviving daughters or to arrive at the construction in the light of events as they subsequently happened. The will must be construed as of the date of the testator's death and upon the facts as they existed and were known to him at that date. The fact that Catherine died before November 1, 1915, although after the testator, cannot be used as a reason for holding that the intention was that the words of survivorship refer to the time of the death of the testator.

The rule that a will should be construed so as not to leave any intestacy has no place in this discussion since under either construction contended for no intestacy would result. The presumption likewise that a testator does not intend to disinherit those who would otherwise be his heirs can always be overcome by plain words or by implication. The court's function is to construe, not to make a will for the testator. Grothe's Estate, 229 Pa. St. 186, 190. In Bertelmann's will, it clearly appears that he did intend, under certain circumstances, to disinherit certain of his heirs. Non-surviving sons were, under certain circumstances, to be disinherited under Article "Third." The children of non-surviving sons were to be disinherited. Sons who, though surviving, should fail to comply with the requirement as to payment, were to be disinherited in so far as the

land was concerned and to receive only the lesser payment of $5000. Beyond any question likewise non-surviving daughters and their children were to be disinherited, passing for the moment the question as to what period of survivorship was referred to. There is no room for any eloquence on behalf of poor, disinherited grandchildren. The court does not do the disinheriting; the testator has done it himself and what he has done we must all respect now. Much worse things according to the views of some of us have been done by testators in the way of disinheriting heirs than were done in the present will.

9.

COMMENTS ON ARGUMENT FOR DEFENDANTS IN ERROR.

The main argument advanced on behalf of the plaintiffs seems to be that it is apparent from the will that it was the testator's intention to treat alike all of his children and to devise to the children of any deceased child by way of substitution for the share which would otherwise go to that child. In the foregoing pages we have already answered this contention to some extent. It is our contention that no such scheme of equality, in so far at least as the provisions of Article "Third" are concerned, is apparent or can be supported. It may be added, however, that the statement in the plaintiffs' brief in the court below that the lands devised by Article "Third," yielding as they did $6000 rent annually,

can well be regarded as of the value of $100,000, emphasizes the correctness of our contention as to some of those inequalities. (1) The testator in clause three deliberately gave to his three sons (three at most) all the lands (worth about $100,000) less the cost to them of from $30,000 to $40,000, while he gave to the six daughters at most $30,000 in all ($5000 to each). (2) He beyond doubt gave all the lands to the "then surviving" sons while he gave nothing to the non-surviving sons, not even $5000. (To show this inequality of treatment of the sons, it is immaterial whether he meant those surviving at his death or those surviving at the end of the 25-year lease.) (3) He made it possible for *one* "then surviving son" (if there was only one) to be the devisee of all the lands by paying to the daughters, six at most, $5000 each or $30,000 in all and for that sum to acquire $100,000 worth of land. (4) He made it possible for one of two "then surviving sons" to have all the lands (worth $100,000) by paying at most $35,000, i. e., to receive $65,000 net value, while the other "then surviving" son, if financially unable, would get only $5000 and no land.

And even under opposing counsel's contention the testator would not be treating his children equally for any daughters who died before him would get nothing and their children would get nothing. Under the contentions for the defendants in error if five daughters had died before the testator and one had survived him, the one would get $5000 and the five and their children would get nothing. And all the

time these are the same grandchildren in whose behalf the plaintiffs' brief pleads so eloquently. The truth of the matter is that to refer the words of survivorship to the testator's death does not in principle accomplish equality of treatment among the children or grandchildren any more effectually than does a reference of those words to the time of distribution (the end of the 25-year lease). In either event if any children have predeceased they get nothing. Of course, the fact known now but not known at testator's death that one daughter who survived the testator died before November 1, 1915, and that none died before the testator cannot affect the intention of the testator or be considered in the construction of the will. The instrument must be construed as of the date of the testator's death.

That the expiration of the 25-year lease and the period of one year thereafter is the time when the sons are required to make the payments to the daughters is conceded by the defendants in error.

The devise of the income under Article "First" to the testator's "children or surviving children" probably means to those surviving at the testator's death and the devise of Susan C. Bertelmann's $2000 a year, during the remainder of the term of the lease, to his "children or surviving children" probably means to those of his children surviving the widow. In the devise of the $4000 to the children, there is no intervening estate whether for life or for years and the survivorship can only be referred to the time of the testator's death. In the case of the $2000 in-

come just referred to, the widow's life interest intervenes between the testator's death and the gift of the same $2000 to the children. In both of these instances the construction which we have just suggested of the reference of the survivorship in the one case to the death of the testator and in the other to the death of the widow is in accordance with the general rule laid down in the authorities above cited; and no inference can be drawn from the language of Article "First" in support of the claim that "surviving daughters" in Article "Third" means those surviving at the testator's death. The circumstances underlying the two articles are different. There are too many indications in the will of an intent on the part of the testator that by "surviving daughters" (in Article "Third") he meant those surviving at the end of the 25-year lease to permit of the construction contended for by the defendants in error; and no indications that the intent was as contended for by the defendants in error.

To adopt plaintiffs' construction of the will requires a resort throughout to surmise as to what the testator intended. It is based upon a theory of equality which is not supported by the words of the will but is, on the contrary, disproven in various ways by the language used. It requires constant reference to what, as others now think, the testator would naturally be expected to do. It has insufficient reference to the language which he used. Our construction on the contrary is borne out in its entirety by the express language used and is not in the

least built upon surmise. The question before the court is, of course, what devise did the testator make in and by this will and not what devises would we have made if we had been in his place. Nor do we mean by this to even appear to admit that the provisions of Article "Third" as we construe them would be unnatural or harsh towards any of his children. The testator best knew his family and best knew by what manner of provisions their best interests could be attained. A desire to avoid as far as possible entangling trusts and provisions for minors may well have actuated him. In any event, the property was his to do with as *he* pleased. What would be "human, natural and right" under the circumstances as he knew them would be for him and not for anyone else to decide.

10.

COMMENTS ON CASES CITED FOR DEFENDANTS IN ERROR IN THE COURT BELOW AND PROBABLY TO BE CITED IN THEIR BRIEF IN THIS COURT.

The contention is made that Catherine's interest, even though contingent, was descendible and that, therefore, her children have it now, and in support of that contention *Winslow v. Goodwin,* 7 Met. 363, is cited. At page 377 that case does hold that contingent interests are transmissible to heirs, but at page 379 it is recognized "that there is an important qualification of this rule that where the existence of

the devisee of a contingent interest at some particular time by implication makes a part of the contingency, and enters into it, the contingent interest cannot descend," and applying this qualification or exception adds (page 379) that if "the devise was limited to the children living at the death of their mother, the objection would be decisive against the plaintiff's claim to the shares of the two children who died before that time." We contend that the devise of $5000 to Catherine was contingent upon her survival of the 25-year lease. If it was, by the very terms of the will the contingency happened before her interests could descend. To descend, there must be an heir; there can be no heir before the ancestor dies; when this ancestor died (before the 25-year lease ended) it became impossible for the devise to her of $5000 to ever take effect or become vested; therefore, it could never descend.

If, on the other hand, the devise to Catherine was *vested* and not contingent, it was nevertheless subjest to defeasance, upon performance of the condition; and the condition has been performed by the sons. It was not a part of the condition that they should pay to Catherine, because she died before the lease expired. The condition of defeasance was, on this theory, a part of the devise to Catherine. The very death of the mother (Catherine) at the time it took place (the sons having performed as to the payments to the other daughters), defeated her so-called vested estate and it became impossible for the latter to descend to her heirs.

As to *Lathrop v. Merrill,* 207 Mass. 6, 10: We agree with the statement that the province of the court is not to conjecture what the testator's intention was and then read it into the will, but to ascertain his intention by construing the words which he used as declaratory of it. We submit that in the construction contended for by the plaintiffs, the rule just cited is violated and that in ours it is not. In the Lathrop case cited by plaintiffs, the court was asked to rule that "since the fourth clause of her will shows that the testatrix intended all legacies to be inalienable and not subject to be taken for the legatees' debts," therefore, "the legacies given by the third clause should be construed to be equitable and not legal interests in order that that intention of hers may be carried into effect." The court refused to do so on the ground that to arrive at that construction, conjecture would have to be resorted to. That is paralleled in this case by the argument that because by clause "Fourth" a devise is made under certain circumstances to the heirs of any deceased child, therefore, under clause "Third" the devise must be held likewise to include the children of any deceased child. The Massachusetts case applies. Conjecture would have to be resorted to. Moreover, the two clauses are so essentially different in their terms, as already pointed out, as to prohibit the adoption of plaintiffs' argument on the point.

The case from 189 Mass. 266 will be found on examination not to be an authority on the point for which it is cited by defendants in error. The words

"surviving children" were not used in the will there under consideration. The only rule laid down was that "in cases of doubt in the construction of wills, the law favors the creation of vested rather than contingent estates."

Schouler, in his work on Executors and Administrators (cited by defendants in error in the court below) "shrinks from entering" into a full discussion of the question as to the time to which words of survivorship are referred. What he says in the section cited (565 and notes) cannot give much comfort to those contending that the words under consideration in the case at bar refer to the death of the testator.

In *Ball v. Holland,* 189 Mass. 369, 373, the court recognized the rule announced by "a line of decisions" that words of survivorship relate to the period of distribution at the end of an intervening life estate, citing *Olney v. Hull,* 21 Pick. 311, and other Mass. cases; but found other language in the will which seemed to the court to require, on the whole, a construction that the words in that particular will related to the death of the testator.

The distinction attempted by defendants in error in the case of *Olney v. Hull* is insufficient and ineffectual. There is no distinction on principle. In the Massachusetts case there was an intervening estate—to the widow for life or widowhood,—and in the case at bar there is an intervening estate, to the widow and children, for the remainder of the life of the lease,—an intervening estate for years.

In *Blanchard v. Blanchard,* 1 Allen 223, the facts and issues were entirely different from those in the case at bar. The devise under consideration was not to survivors, under that designation. It was to five named children and was accompanied with the proviso that "if any of the last five named children die before my wife, then the property to be equally divided between the survivors" and the issue of any non-survivor. The principal question was whether the five named children took vested or contingent remainders. Whether words of survivorship relate to the death of the testator or to some later period of distribution was not a question in the case and the subject was not discussed.

In *Spencer v. Adams,* 211 Mass. 291, 294, the court found sufficient in the will to show that the scheme of testator's will was one "of general equality amongst his children" and found other indications supporting the view that the words of survivorship referred to the testator's death. The will was holographic and the testator illiterate. The case is not in point.

The statement of the majority of the court in the Kahilina case, 14 Haw. 378, 382, 384, that it was the intention of the testator to "treat all the children equally as to quantity of interest" is, it is respectfully submitted, not borne out by the terms of the will. Our argument to the contrary is already set forth hereinabove. The question now under consideration was not before the court in the Kahilina case, and the remark just quoted cannot, for this

reason and for the other reasons already mentioned, be regarded as *res judicata.*

11.

THE SO-CALLED CONDITION SUBSEQUENT HAS NOT BECOME IMPOSSIBLE OF PERFORMANCE. EVEN IF CATHERINE'S CHILDREN NOW OWN A ONE-NINTH INTEREST, PLAINTIFF IN ERROR IS ENTITLED TO PAY THEM $5000 AND THUS DEFEAT THEIR INTEREST AND HERSELF BECOME THE "UNDISPUTABLE" OWNER OF ALL OF THE LANDS MENTIONED IN ARTICLE "THIRD."

The majority of the Supreme Court of Hawaii held that "it is also well settled that the performance of a condition subsequent whereby a vested estate is divested must be strictly construed and fully and literally performed else the vested estate remains absolute. The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease, rendered the condition subsequent, whereby the estate which vested in her should be divested, impossible of performance. (Tr., p. 86.) It is submitted that this was an erroneous view of the law and of the language of the will.

As already stated, our contention is that the words of survivorship ("surviving daughters") contained in what the court below regards as the condition of *defeasance* (in Article "Third") refer to the expiration of the 25 years' lease. If they do, the condi-

tion has been already performed and the defeasance of all the interests of *all* the daughters has been already accomplished by the payment to each of the five daughters who did survive the 25 years' lease.

But the ruling of the court below, as to impossibility of performance, was based upon the view that the words of survivorship refer to the death of the testator. Even upon that assumption, that the sons must pay to the daughters *who survive the testator,* we submit that the condition can be performed by paying to the heirs of Catherine who did survive the testator but who did not live until the time for payment arrived. Upon the assumption stated, this *must* be the conclusion of the court. If the language of Article "Third" is susceptible of two constructions, one of which leaves the provisions of Article "Third" workable and renders effective the devise there made to the sons and the other of which renders Article "Third" wholly unworkable and the devise ineffective, that must be adopted which is consistent with the provision being workable and the devise possible of performance.

It is clear beyond doubt that the sons were not required to make the $5000 payments *before* the expiration of the lease. "At the expiration of the 25 years lease" the lands were to befall on the sons; it was to so befall upon the "*then* surviving sons"; the payments were to be made "at such a time" (the expiration of the lease); and if one or two of the sons should be "at that time or within a year from that time" (meaning always the expiration of the lease)

unable to pay, the non-shortcoming sons could perform.

It is equally clear that the testator intended that upon performance by the sons of the condition named they were to have all the lands mentioned in Article "Third." His words on that point are utterly unambiguous. Did not the testator act in good faith towards his sons when he prepared or directed the preparation of Article "Third"? Is there any reason to doubt that he did? He certainly intended to prescribe a condition capable of performance. If he said that the payments need not be made until the expiration of the lease (and he did) and if he said that the payments must be to all of the daughters who survived him (and this immediate discussion assumes that he did), then he must necessarily have intended that as to any daughter who survived him but did not survive the expiration of the lease the payment could be made to her heirs or assigns. He certainly has not provided anywhere in the will, directly or indirectly, in clear or in hazy language, that as to any such daughter, her heirs or assigns shall retain her one-ninth (or other fractional) interest in common with the sons as the holders of eight-ninths (or other fractional interest). To now declare by construction that one daughter has escaped with a one-ninth interest from the operations of Article "Third" and that the sons have eight-ninths only and cannot acquire the other ninth would be to add a provision wholly foreign to the purposes and intent of the testator. No trace of any

such intention can be found anywhere in the will. The intention expressed was that either the sons should have *all* the land under Article "Third" or, if they failed to perform, the nine children should have one-ninth each under Article "Fourth." And the only failure of performance which the words of the testator recognize is the financial inability of the sons "to furnish, produce or raise the necessary amount" of money. Not a word is said about their inability to perform the highly acrobatic feat of starting out after the expiration of the lease to pay personally to a daughter who died some years before the expiration of the lease. Following the assumption of the court below that the deceased daughter had at her death a descendible interest, that interest in the hands of the heirs was always subject to defeasance upon payment to them of $5000. If it is assumed that the heirs could and did inherit the daughter's interest, what is the difficulty in holding that they could and did inherit it with the same quality of defeasibility which attached to it in the daughter's hands? None, it is submitted. If they inherited the interest at all, they inherited precisely what the mother had and no more, and they inherited her one-ninth subject to the same burden or weakness that it was subject to in the mother's hands, and they inherited the same right to be paid the $5000 which their mother would have received had she survived the lease. There is absolutely no legal impediment to such a construction. To so construe the provision is, upon the assumed facts, to give

meaning and life and workability and sound sense to the provision and to credit the testator with good faith and the desire to talk honestly to his sons when he talked to them in Article "Third." To hold that Catherine's heirs cannot be paid the $5000 and have their interest thereby defeated is to say that the testator did not mean all that he said when he said, as he did, that it was his "sincere wish and will" that his lands (which must mean *all* his interest therein) should "befall" upon his sons; when he said that he was giving to his sons the "right to buy *the* WHOLE *of my lands*" then leased to the Kilauea Sugar Company; when he said that "by doing so," i. e., by performing the condition which he had just stated, his sons would "enter into FULL POSSESSION of ALL my lands"; and when he said that if the sons "comply and fulfill the above conditions" their *"right and title"* to all the lands "will be *undisputable.*" When the testator said these things, was he indulging in any mental reservations such as "I mean, of course, that your title will be undisputable as to the undivided eight-ninths or other lesser interest that you may acquire"; or "By 'my lands' I mean, not all of them but only so much as you shall get"; or "When I say that you shall have the right to buy the *whole* of my lands, I mean, of course, that under some circumstances you may, even if you stand ready to pay all I require of you, get less than the whole of my lands"? Certainly not.

The majority of the court below in its opinion cited authorities which define conditions precedent and

conditions subsequent and which hold that conditions subsequent must be strictly performed and that a condition subsequent that has become impossible of performance is void. As general statements of law, these may be assumed to be correct, but the mere declaration or assumption of the law in these respects is of no assistance in determining what the testator meant by his will. The latter is the important question. What does the language of the testator mean? Did he create a condition subsequent? Did he mean that after a daughter had survived the period named, whatever it was, her children and heirs after her death would not be entitled to the $5000 or that under those circumstances the sons would not be entitled to pay to such children and heirs? If he did mean this, where is the language that shows it? Upon these points the majority opinion below is silent. The majority contents itself with the mere assertion that the condition has become impossible of performance. All that it says on the subject by way of stating its conclusion and its reasons is this: "The death of Mrs. Scott, mother of the plaintiffs, prior to the termination of the lease rendered the condition subsequent whereby the estate which vested in her should be divested impossible of performance. There is no provision in the will whereby the estate so vested in Mrs. Scott should be divested in any mode or manner other than the one prescribed in the will itself, i. e., the payment to her of $5000, a privilege granted to the sons, or one or more of them, by the testator."

A careful examination of the opinion will show nothing more by way of a statement of reasons in support of the view that the condition was that the payment should be made to the daughters personally in their lifetime and that it could not be made to the heirs of a daughter who by living the required length of time had become a "surviving" daughter within the meaning of Article "Third." The majority opinion is neither well reasoned nor convincing. If the intention of the testator was to permit payment to the daughters only even after their survivorship of the prescribed period when their right to the $5000 had become absolute, it should be possible to point definitely to some language in the will supporting that view.

Assuming that by the term "surviving daughters" the testator meant to include those daughters only who should survive the expiration of the lease and assuming that Catherine had survived the expiration of the lease and had lived for one week thereafter and then died, would not the sons under the terms of the will be entitled within the year named to pay the $5000 to her heirs? They certainly would be. The "sincere wish and will" of the testator was indubitably expressed that all of his lands should befall upon his three sons upon their making the payments in question, and the sons were by the testator given the whole of one year within which to make the payments. The mere manner of the making of the payments is a much less important matter which must be made to conform to and to carry

out the general intent so clearly expressed. In the supposed case the daughter having survived the period prescribed there could be no further doubt of her right to the $5000 and that right would descend to her heirs with all of the same characteristics and qualifications which attached to it in the hands of Catherine, and one of them was that the sons had the right to make that payment and thus cause the lands and every interest therein to befall on them.

To hold that the condition is impossible of performance and that the $5000 cannot be paid to the heirs of Catherine on the theory that the payments can be made to *living* daughters only, the result is that the absolutely clear intent of the testator is frustrated. It cannot be urged too often, and we make no apologies for urging it again, that the testator succeeded in making his intention entirely clear in Article "Third" that at the expiration of the 25-year lease he wanted all the lands mentioned and every interest therein to go to his three sons upon two conditions and two only, namely, that they (or one or more of them) should survive the 25-year lease and that they should have the financial ability to make the $5000 payments. Both conditions have been performed. The sons did survive the 25-year lease. They are all living today. The sons have paid five of the daughters; they stand ready to pay to the heirs of the sixth if this court shall say that under the will Catherine was a surviving daughter and that the heirs of Catherine are entitled to such payment; and under these circumstances, the testa-

tor says in Article "Third" that *all* of his lands are to befall upon the three sons and that the sons' "right and title will be undisputable."

If upon the assumption that the words of survivorship ("surviving daughters") relate to the death of the testator the correct view is that the condition is impossible of performance because Catherine died before the expiration of the lease, the result simply shows that the assumption just mentioned is a false one. If the two things conflict, to wit, on the one hand, the legal classification which the court below has accorded to the estate of Catherine at the time of her death and of her children thereafter and the assumption that the words of survivorship relate to the testator's death, and, on the other hand, the intention of the testator as clearly gathered from Article "Third" of the will without reference to the legal nomenclature attached to this, that or the other estate, then the one thing which must yield to the other and which must be thrown out and abandoned is the legal classification of the estate of Catherine and the construction as to the period to which the survivorship refers. Upon all the authorities, upon common sense and upon reason there can be no two ways of looking at this particular point. The general or primary intention of the testator, clearly and easily gathered from the will as a whole, must prevail over the language of any particular paragraph or sentence which at first sight may appear to be inconsistent with the primary intent. "In case of doubt a will should be construed in favor of a gen-

eral or primary intention rather than a particular or secondary one; and where in such a case a particular intention, or particular terms, as expressed in some part of the will, are inconsistent with and repugnant to the testator's general intention as ascertained from all the provisions of the will, the general intention must prevail." 40 Cyc. 1393. And see, for example, *Fidelity Trust Co. v. Bobloski,* 228 Pa. St. 52, 54; *Sheetz's Appeal,* 82 Pa. St. 213, 217; *Phelps v. Bates,* 54 Conn. 11, 15; *Baxter v. Baxter,* 122 Mass. 87; and *Barrett v. Marsh,* 126 Mass. 213, 216. See also dissenting opinion of Chief Justice Robertson in the case at bar. (Tr., p. 90.) The intention of the testator is the court's guiding star and it must be adhered to and preserved and complied with unless indeed there is some rule of law which that intention, if carried out, would contravene, and that no one claims and no one can successfully claim is the case here.

All rules as to so-called strict construction of conditions subsequent and liberal construction of other conditions are intended as mere aids in the ascertainment of the intention of the testator. The moment that they not only fail as such aids but serve to frustrate the testator's intention, the court should refuse to enforce or apply them.

If the correct answer be, upon the assumption that the words of survivorship relate to the death of the testator, that the condition is now impossible of performance because Catherine died before the expiration of the lease, then that difficulty simply empha-

sizes, and tremendously emphasizes, the correctness of the contention which we have advanced and argued for first, last and all the time, that the words of survivorship ("surviving daughters") do not relate to the time of the death of the testator but do relate to the expiration of the lease. Adopt that construction and all difficulty disappears. Adopt that construction and no acrobatic feat would be required of the sons who were told that they need not start out to make the payments until after the expiration of the 25-year lease, were told, upon the lower court's view, that the payments must be to living daughters personally and then were told that they must also pay to any daughter or daughters who survived the testator but did not live until the expiration of the lease. We find it impossible, we confess, to discover any ambiguity or doubt upon the point that the sons need not pay until the expiration of the lease or upon the point that it was the sincere wish and will of the testator that all of the lands mentioned, including every interest therein, in fee simple absolute, unencumbered by any outstanding interests, should go to his three sons provided only they survived the 25-year lease and were financially able to pay and did pay to the surviving daughters. We find ourselves unable, we further confess, to discover any lurking fraud on the testator's part, to discover, in other words, that he did not unequivocally intend and contemplate that what he was asking his sons to do (in the condition of payment which he prescribed) was something which they could do, was something

which under the rule or measure of survivorship which he prescribed as to the daughters the sons could do.

We submit that the testator in Articles "Third" and "Fourth" contemplated only two alternatives, the one under Article "Fourth" that the nine children, or their heirs or assigns respectively by way of representation, should have an undivided one-ninth each if none of the sons did survive the 25-year period or if none of them was financially able and willing to make the payments prescribed to the surviving daughters and the other under Article "Third" that if one or more of the sons should survive the lease and should be financially able and willing to pay, such son or sons should have all of the land. We submit further that not the slightest straw of support can be found anywhere in the will for a third alternative by way of a cross between these two whereby the sons, although surviving the lease and although financially able and willing to pay, should have less than the whole land and less than every interest in the land and one or more of the daughters should have an interest or interests in the land in common with the sons. If we are correct in this assertion that such a third alternative finds no support whatever in the language of the will, it is but another fact showing that our construction is not only the correct one but the only correct one when we say that the words of survivorship as to the daughters refer to the expiration of the 25-year lease.

Authorities on this question of the alleged impos-

sibility of performance we have not cited because it seems to us that the question does not admit of citations. It is a pure question of construction. What did the testator intend? What he intended is to be learned from a study of his words and not from a study of general rules about "strict construction" or liberal construction of conditions subsequent or conditions precedent.

12.

ASSIGNABILITY OF SONS' INTERESTS.

In view of the statement in the opinion of the majority of the court below that, referring to the right of the sons to pay the sums named and thus become the "undisputable" owners of the land, "the privilege granted seems personal" and non-assignable, the subject of the assignability of the interests and rights of the sons prior to the expiration of the lease and prior to performance of the condition is here considered.

Under the majority opinion in *Bertelmann v. Kahilina,* 14 Haw. 378, the nine children took present vested estates in fee, defeasible as to the interests of the daughters and shortcoming sons or son upon the performance of the prescribed conditions by the other son or sons, the sons meanwhile having contingent executory devises as to such interests. The only other possibility of construction, as to the devise to the sons, is that they took under the will contingent remainders, contingent as to each of them,

first, upon his surviving the expiration of the lease, and second, upon his making the payments above mentioned within the required time. In other words, the only three possibilities that need be considered are that each of the sons had either a vested estate or, second, an executory devise in the nature of a contingent remainder, or, third, a contingent remainder.

In entering upon this discussion we adhere to our view, that in the construction of the words "surviving daughters" it is immaterial whether the estate given to the daughters is vested or contingent, since the words can have but one meaning whether the clause in which they occur be regarded as a condition of divesting or a condition of vesting.

12-A.

ASSIGNABILITY OF VESTED REMAINDERS.

If each of the sons and in so far as each of the sons took under the will a vested estate there is no doubt that that estate was alienable, descendible and devisable. The authorities are all in harmony on that point. It is too well established to permit of the citation of authorities.

12-B.

ASSIGNABILITY OF CONTINGENT REMAINDERS AND EXECUTORY DEVISES.

As between contingent remainders and executory devises in the nature of contingent remainders, none

of the authorities, as far as we have been able to discover, draw any distinction. Whether the cases tend the one way or the other on the subject of assignability under certain circumstances, the same is said in each of them with reference to these two classes of interests. See, for example, *Medley v. Medley,* 81 Va. 265, and *Watson v. Smith,* 110 N. C. 6, 9.

Nor is there any doubt that assignments of contingent remainders, irrespective of whether the contingency related to the existence of the devisee at a particular time or to the happening or failure to happen of a separate event, were operative at the common law by way of estoppel at least and that after the happening of the event which transformed the contingent remainder into a vested estate the estoppel was deemed to have operated to create an estate, or, rather the deed which until then was operative only by way of estoppel became in its substantial results operative as a deed.

Foster v. Hackett, 112 N. C. 546;
Doe v. Oliver, 10 B. & C. 181;
2 Washb. R. P. 528, 529.

Again, assignments of contingent remainders irrespective of the nature of the contingency have always been in England recognized and enforced in equity; that is to say, that although such assignments may have been in certain cases disregarded in the courts of common law they were always regarded as valid in courts of equity and the method of enforcement was either by declaring the grantor to be a trustee for the grantee or by regarding the deed

as an executory contract. In the latter event, if the deed was found to be for a valuable consideration and free from fraud, equity would, after the vesting was accomplished by the happening or failure to happen of the contingency, decree specific performance of the executory contract.

16 Cyc. 653;
Hannon v. Christofer, 34 N. J. Eq. 459;
Wilcox v. Daniels, 15 R. I. 261, 263;
Mudge v. Hammill, 21 R. I. 283, 286;
4 Kent 261, 262;
1 Tiffany, R. P., Section 129, p. 306;
Wright v. Brown, 116 N. Car. 26;
Bayler v. Com., 40 Pa. St. 37.

Either one of these two views, i. e., (a) that such assignments operate by way of estoppel and (b) that they are recognized and enforced in equity, suffices to dispose of this case favorably to the plaintiff in error in so far as the question of assignability is concerned because at best no one other than the sons could possibly be in a position to successfully dispute the assignments or conveyances and because if the assignments are recognizable and enforcible in equity the defendant is enabled in that forum to protect the conveyances to her, each of which was for a valuable consideration and free from fraud. The mere fact that the construction of the will is being sought by means of a submission upon a case agreed cannot operate to lessen the rights of this plaintiff in error with respect to the assignability of the interest

of each of the sons or place her in a worse position than she would have been in were she now before a court of equity. Not only is this not disputed by the defendants in error but they have joined us in writing and orally in asking that neither technical defects in the submission nor the fact that the adjudication of the court is being sought by means of a submission shall be held against either of the parties herein.

Even at common law, contingent remainders and executory devises by way of contingent remainders were undoubtedly assignable, descendible and devisible when the contingency or uncertainty was, not as to the existence or survival at a stated time of the person who was to take, but as to the happening of some other event. (All contingent remainders and executory devises, irrespective of the nature of the contingency, were assignable in equity in England.) If, as it is said, a person is in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, as where the devise is to A for life and the remainder to B, but if B dies before twenty-one, then remainder to C, the contingent interest in C is assignable; and the ground given for so holding was that in the event last stated, the devisee had a possibility coupled with an interest and not a mere possibility.

Cases are to be found holding that if the uncertainty or contingency is in the person who is to take upon the happening of the contingency, as where the

devise is to A for life with remainder to his heirs or to such of his children as shall survive him, the interest of the contingent remaindermen is a mere possibility and not a possibility coupled with an interest. It is respectfully submitted that the reasoning of these cases and the distinctions which they attempt to draw are unsound. If a remainder to A contingent upon B's reaching twenty-one or upon his dying before thirty without leaving issue surviving him is a possibility coupled with an interest, why in the case of a remainder to A contingent upon his (A's) surviving B or any other stated period of time is it any the less a possibility coupled with an interest? The one is not a mere possibility any more than the other. The hope or expectancy of an heir apparent is a mere possibility. The hope or expectancy of one who has been named a devisee in the will of another who is still living is a mere possibility. The hope or expectancy of a son or daughter, a parent or other relative that an aged ancestor will leave him his property or a part of it is a mere possibility. In each of these instances the hope and the expectancy can be destroyed absolutely by the act of the ancestor in making a will to another. But where there is a provision in a will or deed naming A, B or C, or all of them, as the recipients of a contingent remainder, whatever the contingency may be and whether strictly a contingent remainder or an executory devise by way of contingent remainder, and the testator or grantor has died, a legal act has been done, limiting and defining the rights of the devisee, and

placed of record which cannot be withdrawn or destroyed or rendered nugatory except by the contingency happening adversely to the vesting of the contingent remainder or executory devise. What can it matter on principle whether the contingency consists of one uncertainty or of another uncertainty or of two uncertainties, whether it consists in an uncertainty as to the death of another or as to the survival of the issue of that other or whether it consists in the survival at a certain time of the contingent devisee himself? What can it matter on principle whether the adverse happening of the contingency will vest the remainder in another person or whether it will prevent the remainder vesting in the person named without vesting it in anyone else? In each instance the devisee under consideration finds finally that his contingent interest has failed to vest. In each instance, he had a chance of its vesting. In each instance, his chance was limited in and by a written instrument validly executed by the owner of the land. In each instance, neither the former owner nor any one else can, after the will becomes operative as a will, deprive the devisee of the chance and right which he has of obtaining the property. In each instance, the devisee has something substantial, more than a mere possibility, which is marketable and which, in other words, business men of sound sense and experience are prepared to pay for and acquire in advance of the happening of the contingency. In each instance, there is an uncertainty as to whether the devisee will ever take but in each in-

stance also the devisee has by a lawful act, grant or limitation of the original owner of the property acquired a right in that property which is indestructible and which is surely more than a mere hope or expectancy. In each of the instances just above mentioned, the failure of the contingency to happen in the right way will make it impossible for the estate to vest in the devisee whether he be specifically named or be one of several named as a class and whether the contingency be as to his survival or as to some other event. In a devise to the heirs of A who is now living, there is always some ascertained person in being who would take if the contingency would happen now, and that seems to be all that is required in the case of a possibility coupled with an interest. In the case at bar the devise is to three named persons, all of whom were in being at the testator's death.

"The authorities all seem to be agreed that a contingent remainder is alienable when the remainderman is ascertained and the uncertainty which makes it contingent is in the event on which it is limited to take effect, because in such case the possibility is coupled with an interest. If the remainderman is not ascertained, then, according to some authorities, there is not a possibility coupled with an interest, but only a bare possibility, which is not subject to sale or transfer. These decisions do not appear to be sound in principle, because in almost every conceivable case of a contingent remainder of this sort, as distinguished from limitations to persons not in being, there is some ascertained person in whom the remainder will vest, if the existing conditions remain unchanged until the happening of the contin-

gency or the determination of the particular estate, as, for instance, a limitation to the children of the life tenant living at his death, or to the right heirs of a living person, etc. Under such circumstances it seems very clear that a person so situated with respect to the remainder has just as much of an interest as if the remainder had been specifically limited to him on a contingency. The only difference is that in the one case a change of circumstances may vest the remainder in another person, while in the other case the contingency may prevent the remainder from vesting in the person named, without vesting it in any one else. On reason, therefore, in any case where the remainderman is not ascertained, but where there is a person in existence in whom the remainder would immediately vest on the present happening of the contingency or the present determination of the particular estate, such person has a possibility coupled with an interest which he may transfer to another, subject, of course, to the same contingency by which it is affected in his hands. And this view is amply supported by authority as well as reason." 24 A. & E. Ency. 406.

The common law rule, if it can be called that, that contingent remainders are not assignable where the uncertainty is as to the person who is to take, e. g., where the devise is to A for life and at his death to B, C and D or to such of them as shall survive A, has been abolished by statute in many states. In other states without the aid of statute and purely on principle the rule is rejected as unsound and also because it is inconsistent with the conditions and tendencies of the present day.

In *Jones v. Roe,* 3 D. & E. (Term Reports) 88, 93-96, with opinions written by four judges, it was held that a possibility coupled with an interest is devis-

able. Chief Justice Kenyon said that it was "high time that this question should be understood to be completely at rest." No distinction was made between executory devises and contingent remainders but on the contrary both were expressly held to be devisable. The court recognized that there had been considerable hesitation on the part of English courts in holding executory devises to be transmissible but declared that the old doctrine at the date of *Jones v. Roe* was exploded. "Executory devises are not naked possibilities but are in the nature of contingent remainders and there is no doubt that such estates are transmissible and consequently devisable." Space does not permit of lengthy extracts from the opinions but they are all worthy of examination. The fact that the English statute of wills passed in 32 Hen. VIII (1541) enabled persons "having any manors, lands, etc., to devise" was deemed by the court significant. It was held to mean that any person having an interest in the lands could devise and it was then held that a contingent remainder was a possibility coupled with an interest. It is true that in that particular case, the contingency was as to whether the first taker should attain the age of twenty-one years and not whether the later taker should survive a stated period, but in the last analysis even in such a case as that is there not the same sort of doubt, no greater and no less, as to who the taker after the first estate is to be? For if the first taker does reach twenty-one he takes and if he does not reach twenty-one the other takes. Is there

not as much doubt and uncertainty under those circumstances as to who the taker is to be as in a case where the contingent remainders or executory devises are declared to be to A, B and C, or to such of them as shall survive at a stated time? In either event, until the stated time arrives, it is impossible to know with absolute certainty which contingent interest will vest; but in either event likewise each of the contingent devisees has had limited to him by a legal will or deed as the case may be, a well-defined right which is indestructible by the testator or grantor and which is more than a mere possibility.

Moreover if the English statute of wills meant what the court in *Jones v. Roe* said it meant, and it certainly did, our Hawaiian statute is at least as effective in the same direction when it provides that every person may dispose of "his or her estate" by will. *R. L. Haw.,* Sec. 3258. This cannot include less than all of the testator's property or rights of property.

The modern tendency is to depart from the old unfounded distinctions and the old rules based upon conditions in England which no longer exist. In *Putnam v. Story,* 132 Mass. 205, the devise was to the daughter Frances for life "and at her decease the capital sum to be equally divided among the heirs of my said daughter share and share alike," and the question was "whether the children of Frances took any interest during the life of the testator's widow and of their mother which was assignable." It was recognized that the children of Frances did not take

a vested remainder but that their interest was in the nature of a contingent remainder. The children were held to have "a vested interest in a contingent remainder" which was assignable and which would pass to an assignee in bankruptcy or insolvency subject to the same contingency in the hands of the assignee as in those of the assignor.

Where the testator (Sawyer) provided that "when the youngest living child arrives at the age of twenty-one years, then one-half of the property shall be divided equally among all the children living," the court said, "According to numerous recent decisions each child of Mr. Sawyer took an interest in his estate which was alienable before the youngest child became of age. It was not a mere possibility but a fixed right to take as purchaser under the devise which could be defeated only by his death before the date for distribution or by Mrs. Sawyer's disposing of the property. Assuming that she had an implied power to sell and use the proceeds, this would not defeat the alienability of the sons' interest. The alienation, of course, would be subject to all contingencies." *Wainwright v. Sawyer,* 150 Mass. 168, 170. In the case last cited, the court correctly noted that each child's was a *fixed right* and it was fixed simply because it had been lawfully declared or limited in a way (by will) that took the child out of the class of those who have a mere hope or expectancy which can be shattered at will by the ancestor and was placed in the class of those whose right is so defined and limited by the ancestor that after his death it cannot

be terminated or lessened. Under such circumstances, as that court correctly observed, the right is not a mere possibility. It rises to the dignity of an interest.

In *Dunn v. Sargent,* 101 Mass. 336, the devise was for the benefit of Benjamin C. for life and at his death to his children "but if he should die without children, then to such of his brothers and sisters as might survive him, and if either should die in his lifetime leaving child or children, such child or children should take the parent's share." In holding that the interests of the brothers and sisters were contingent remainders, the court said:

"The contingency upon which the vesting of their interests in possession depended was the event of their brother Benjamin's dying without leaving children, during their lifetime. Their interests were not indeed transmissible or devisable because the gift in remainder was to such of them only as should survive Benjamin. But though not vested in possession, and subject to be defeated by the death of the legatee in remainder during the life of Benjamin or his children, they were vested in right from the death of the testatrix, and capable of alienation, subject of course to the same contingencies in the hands of the assignees as in those of the assignor." Ib.

"The interest of the petitioner in the estate of her grandmother, though a contingent remainder which would not vest in possession unless and until she survived her parents, was yet vested in her in right from the death of the testatrix, capable of alienation by her during the life of her parents, * * * subject to the same contingencies in the hands of the assignee as in those of the assignor." *Belcher v. Burnett,* 126 Mass. 230.

"A contingent interest which nothing but the death

of the bankrupt can prevent vesting in him may, without any forced construction, be regarded as a 'right of property.'" *Nash v. Nash,* 12 Allen 345, 348.

"It is true as stated in the argument that a possibility cannot be transferred at law. But by a possibility we mean such an interest as the chance of succession which the heir apparent has in his ancestor's estate; which a next of kin has of coming in for a part of his kinsman's estate; which a relation has of having a legacy left him, etc. Such interests as these, we conceive, are the true technical possibilities of the common law." *Fortescue v. Satterthwaite,* 23 N. Car. 567, 570. The sons' interests in the case at bar were not in that category.

In *Bodenhammer v. Welch,* 89 N. Car. 78, the devise was to the widow for life "and after her death to be equally divided between all of his" (the testator's) "children that are then living. * * * Had the plaintiff, Randall Bodenhammer" (one of the children of the testator) "such an interest in the land described in the petition as was subject to be sold or disposed of by him? His interest was contingent depending upon his surviving his mother." (In the case at bar the sons' interests under paragraph "Third" depended upon their surviving the expiration of the lease.) "It was not as contended a mere possibility but an estate in the land, an executory devise or rather a contingent remainder which is a certain interest. * * * That executory devises, contingent remainders and other possibilities coupled with an interest may be assigned is maintained in *Jones v. Roe,* 3 D. & E. 88," and other cases there

cited. The conclusion was that the son's contingent interest was assignable.

A remainder which was limited by the language "and upon their deaths the said residue to be divided among my nephews and nieces then living that are now or may before that time be born," was held to be contingent and assignable although dependent upon the survivorship of the devisees at a stated time. *Grayson v. Tyler's Adm'x,* 80 Ky. 358, 358. The claim was advanced in argument that "a contingent remainder is not capable of alienation where the person who is to take is not ascertained." The court said, inter alia:

"The contingency upon which the claim of the appellant could be defeated, and no other, was that of his dying before the life tenant. * * * This nephew was living at the testator's death, and had an interest in the estate devised that no one could divest him of by will or deed and nothing could defeat the devise, so far as he was interested, but the happening of the contingency, viz., his dying before his mother. * * * There is a manifest distinction between this case and a mere possibility, such as the expectation or presumption that the child will take from the father. In the latter case the possibility is not coupled with an interest. * * * It is plain, we think, when an estate is devised to one in being, his right to depend upon his surviving another is something more than a mere naked possibility. The death of the primary devisee will" (not?) "alone vest him with the absolute title, but yet the contingent interest is something that no one can divest him of, and is certainly of more value and of greater interest than the mere expectancy or possibility that someone may die without a will or without conveying his property or leaving property that his next of kin may

inherit. * * * There is a right and an interest in such a devise that is far more certain and fixed than a mere naked possibility. All others are excluded for the time being from any right to his contingent interest, and this right of his, by reason of the devise, may ripen into a perfect title. Besides, the tendency of modern decisions, as well as that in legislation, is to facilitate the transfer and alienation of such estates. * * * It follows, therefore, that the contingent interest of the appellant was the subject of transfer and sale, and that John Tyler became the owner by reason of the agreement of September 26, 1851."

Discussing a remainder to those who would be the "heirs" of A at a certain time, the court in *MacDonald v. Bank,* 123 Iowa 413, gave helpful definitions of the terms "possibility" and "interest" and held that the "heirs" as contingent remaindermen had more than a mere possibility, that their "interests" were not mere expectancies. They had their foundation in the "provision," "the legal act" of the will.

In Missouri, also, without the aid of a statute, the common law view as to non-assignability of the class of contingent remainders immediately under consideration has been rejected. In *Godman v. Simmons,* 113 Mo. 122, 129, the estate of the remainderman "was contingent upon the death of their mother and their surviving her. The first event was sure to happen and they were sure to take if they would survive her; but whether they would survive her and thus become heirs of her body was uncertain and hence the interest they had was no more than a

contingent remainder and a contingent remainder of that class that grows out of the uncertainty of the persons to take at the determination of the life estate." (This is the same class in which under some of the authorities the sons in the case at bar would fall.) "Such an interest was not alienable at common law before the contingency happened. * * * This rule of the common law seems to have been abolished in England by 8 and 9 Victoria, Chapter 106, * * * and by statute in" certain states.

"In this state, while we have no similar express statute our statutes do provide" for conveyances of "any estate or interest therein," for the sale of all "estates and interest" under execution and for the partition of land at the request of any person "having an interest" in real estate.

"This rule of the common law seems to be inconsistent with the general scope of our statutes regulating the disposal of real estate and not in harmony with the genius and spirit of our institutions which brooks no restraint upon the power of the citizen to alienate any of his property. We are pre-eminently a trading and commercial people; our lands are our greatest stock in trade and the whole tendency of our laws is to encourage and not restrain their alienation. The spirit and genius of the feudal system and the common law were exactly the reverse and we do not think this now almost obsolete common law rule ought to obtain in this state."

All of this can be said with equal force in Hawaii. Elsewhere in this brief are enumerated legislative acts and judicial decisions showing an entire departure by Hawaii in its treatment of property and its

alienability from the views and methods prevailing at the common law of England,—a departure, let it be remembered, which took place long before the enactment of section 1 of the Revised Laws, adopting, with qualifications, the common law of England as the law of Hawaii. It would certainly come as a great surprise to laymen and lawyers alike, in Hawaii, to now learn that the genius and spirit of our institutions long prior to 1893 was not in favor of the freedom of alienation of land and of all manner of estates and interests in land.

The Missouri court went on to say:

"The doctrine that contingent interests in real estate cannot be conveyed at law remained as one of the last relics of a system of which the policy was to hinder the alienation of land," and it might have added as one of the last relics of the feudal system. That feudal system and its methods of dealing in land have been so largely repudiated in Hawaii as to require the further repudiation of any portions not heretofore specifically disowned. "A contingent remainder is not an estate in lands since it is merely the chance of having; but it is an *interest* in land and one which long remained inalienable simply because it had never been thought worth legislating about; so that, as Williams says (Williams on Real Property, 257), 'the circumstance of a contingent remainder having been so long inalienable at law was a curious relic of the ancient feudal system.' * * * This ancient common law rule—that contingent remainders are inalienable, like the rule that choses in action are not assignable—does not obtain in this state; not because there has been a positive statute abolishing these rules but because they are out of harmony with its general affirmative statutes upon these subjects and long since have ceased, if they

ever did exist, as rules governing the action of its citizens in the business relations of life." *Godman v. Simmons,* 113 Mo. 122.

In contending that contingent remainders are descendible and devisable, we recognize that the rule is always subject to the exception referred to earlier in this brief in discussing the case of *Winslow v. Goodwin,* 7 Met. 363, that where the very existence or survivorship of the devisee at a time stated is essential to the vesting of the estate, the devisee's interest cannot, if he fails to survive as required, descend or be devised because at his death there is nothing left to descend or to be devised.

As to the assignability of contingent interests, see also the following:

Whelen v. Phillips, 151 Pa. St. 312;
Brown v. Fulkerson, 125 Mo. 400, 403;
2 A. & E. Ency. 1010, 1011, 1026, 1031;
22 A. & E. Ency. 1034;
4 Cyc. 14;
Thompson v. Hoop, 6 Ohio St. 480;
Winslow v. Goodwin, 7 Met. 363;
Gardner v. Hooper, 3 Gray. 398;
Heard v. Reed, 169 Mass. 220;
Sikemeier v. Galvin, 124 Mo. 367.

The case of *Graves v. Spurr, Trustee,* 97 Ky. 651, was cited below on plaintiffs' behalf. In that case the court did venture some remarks as to the non-descendibility and non-devisability of contingent remainders and executory devises where the person to

take is uncertain. If what is there said on the subject can be regarded as an actual decision the case falls within a class which was dealt with hereinabove and which has been shown, as we hope, to be unsound in principle and contrary to the law of Hawaii. But it is submitted that the remarks in *Graves v. Spurr* on the subject are purely *obiter dicta.* In that case the particular remainder under consideration was held to be descendible. There was no uncertainty as to the person who was to take. "This trouble," the court said, "does not arise in this case." P. 658. The uncertainty as to the person arises, it said, where the estate is given over, after a life estate, to the survivor of a class of persons "but that is not the case here." Syllabus, p. 651. The devise over, after the life estate, was "to her child or children, and, if she leave none, to her brothers and sisters." P. 643. There were no words of survivorship in the will there under consideration. The facts and circumstances were materially different from those in the case at bar.

12-C.

THE COMMON LAW RULE, IF ANY, IN RESTRAINT OF ALIENATION IS NOT LAW IN HAWAII. COMPLETE FREEDOM OF ALIENATION IS THE RULE AND POLICY IN HAWAII.

In Hawaii the common law rule, if it was such, can have no existence because:

1. Our law, written and unwritten, favors and

since 1846 always has favored freedom in alienation of all lands and interests in land. Opposing counsel will not, we think, deny this. Starting with a feudal system somewhat similar to that which prevailed in old England did not the King in 1846, educated and urged thereto by the foreigners who had made their homes in these islands, abolish the old system of land tenures under which the individual had no enforcible rights either of ownership or of alienation and substitute in its place substantially the system which prevails in all modern countries of absolute individual ownership with the accompanying right to lease, mortgage, sell or otherwise alienate? If there were nothing else in the history of these islands that one act alone would constitute a clear showing of the policy of freedom of alienation. See *Rooke v. Hospital,* 12 Haw. 391.

But the decisions of the courts of Hawaii when considering various common law rules and principles with reference to the ownership and disposition of property contain many acts and declarations indicative of the same general policy. See, for example:

Henrique v. Paris, 10 Haw. 408;
Thurston v. Allen, 8 Haw. 392 (399);
Van Giesen v. Magoon, 20 Haw. 146;
Rooke v. Hospital, 12 Haw. 391.

Other cases are referred to hereinafter.

2. The Hawaiian statute of wills (R. L., Sec. 3258) declares that "Every person of the age of

eighteen years and of sound mind may dispose of his or her estate both real and personal by will" which means, if it means anything, all his or her estate and of all kinds. This is inconsistent with any rule of non-devisability. See *Rooke v. Hospital,* 12 Haw. 391, 2.

3. The Hawaiian statute on the descent of property (R. L., Sec. 3243) provides that "whenever any person shall die intestate without this Territory, his property, both real and personal, of every kind and description shall" (with exceptions immaterial hereto) "descend to and be divided among his heirs as in this chapter prescribed." This includes, as the express language says, property "of every kind and description" and is inconsistent with any rule of non-descendibility.

4. By Hawaiian statute, assignments of choses in action are recognizable at law. R. L., Sec. 2372. Such assignments were not recognized at the common law of England. The doctrine of non-assignability of choses in action has been repudiated by the Supreme Court. See for example,

In re Kealiiahonui, 9 Haw. 6;
Mossman v. Government, 10 Haw. 421, 436;
Brown v. Spreckels, 18 Haw. 91;
Van Giesen v. Magoon, 20 Haw. 146.

5. Under the Hawaiian statutes of eminent domain, the state can take contingent interests of all kinds. See, for example, R. L., Secs. 670, 672, 3, 7, and *Magoon v. Brash,* 11 Haw. 204. If any contin-

gent interest can be taken in invitum, so also it should be possible for the owner to dispose of it of his own acord.

6. Every interest in property is taxable and may be levied on and sold in satisfaction of taxes. See, for example, R. L., Secs. 1241, 1242, 1292.

7. That the feudal system of England, which gave rise to so many of the doctrines of the common law and in particular to the doctrine of non-alienability of property has no place in Hawaii and that, therefore, the doctrines arising out of and dependent upon that system themselves have no proper place in Hawaii, has been decided in several of the decisions of the Supreme Court of Hawaii.

Awa v. Horner, 5 Haw. 543;
Rooke v. Hospital, 12 Haw. 391, 394;
Branca v. Makuakane, 13 Haw. 499;
Thurston v. Allen, 8 Haw. 396;
Godfrey v. Rowland, 16 Haw. 388.

It has been well said in several of these cases that the reasons for the rule failing the rule itself cannot exist and the doctrines dependent upon that system must be deemed to be contrary to Hawaiian judicial precedent or Hawaiian usage.

Branca v. Makuakane, 13 Haw. 499;
Henrique v. Paris, 10 Haw. 418;
Van Giesen v. Magoon, 20 Haw. 146.

8. The rule of the common law that a conveyance cannot be made of a freehold estate *in futuro* has been repudiated.

Puukaiakea v. Hiaa, 5 Haw. 484;
Kuuku v. Kawainui, 4 Haw. 515.

9. The doctrines of champerty and maintenance have no place in Hawaii.

Mossman v. Government, 10 Haw. 421;
Ninia v. Wilder, 12 Haw. 104;
Brown v. Spreckels, 18 Haw. 91;
Henrique v. Paris, 10 Haw. 408;
Van Giesen v. Magoon, 20 Haw. 146.

10. A deed may be made by a disseisee to a stranger.

Mossman v. Government, 10 Haw. 421;
Ninia v. Wilder, 12 Haw. 104;
Brown v. Spreckels, 18 Haw. 91;
Van Giesen v. Magoon, 20 Haw. 146.

11. Estates tail do not exist in Hawaii.

Rooke v. Hospital, 12 Haw. 375.

12. Conditional fees likewise do not exist in Hawaii.

Ib., 375.

13. In Hawaii, there is no necessity for livery of seizin.

Puukaiakea v. Kiaa, 5 Haw. 484;
Judd v. Ladd, 1 Haw. 17;
Brown v. Spreckels, 18 Haw. 91;
Van Giesen v. Magoon, 20 Haw. 146.

14. Obsolete parts of the common law are not in force in Hawaii.

Mossman v. Government, 10 Haw. 421.

15. The doctrine that there can be no limitation over of a chattel has been rejected in Hawaii.

Damon v. Dickson, 7 Haw. 694.

16. So also has the doctrine of the destruction of contingent remainders through the merger of estates.

Godfrey v. Rowland, 16 Haw. 377;
Evans v. Bishop Trust Co., 21 Haw. 74.

17. Any and all technical rules of the common law which hinder the construction of a will in such a way as to enforce the intent of the testator are disregarded.

4 Haw. 515, 517;
Thurston v. Allen, 8 Haw. 392;
Rooke v. Queen's Hospital, 12 Haw. 375, 399.

18. The word "heirs" is not necessary in Hawaii to convey a fee.

Branca v. Makuakane, 13 Haw. 499.

19. The rule in Shelley's case, "an ancient dogma of the common law," has been rejected.

Thurston v. Allen, 8 Haw. 392.

20. When a rule such as that relating to a conveyance by a disseisee to a third party is "not adapted to the conditions of equality, freedom of trade and fair administration of justice that have long prevailed here" it has been rejected by the Supreme Court of Hawaii.

Mossman v. Hawaiian Government, 10 Haw. 421, 435;

Henrique v. Paris, 10 Haw. 408.

It is true that some of these decisions were made before January 1, 1893, the date of the enactment of the present Section 1 of the Revised Laws (adopting, with qualifications, the common law of England as the law of Hawaii), at a time when by statute this court was at liberty to adopt only those principles of the common law which it deemed not inconsistent with our institutions or the principles of justice; and yet many others have been rendered since January 1, 1893, and are based upon the ground that the rejected doctrines are within the exceptions named in Section 1 because contrary to Hawaiian judicial precedents or to Hawaiian usage, and since the enactment of Section 1, it has been considered that the previous rejection of certain essential parts of a system justified the present rejection of other parts, and that the previous application (contrary to the common law) of a general principle to one question justified its subsequent application to another question. See, for example:

Henrique v. Paris, 10 Haw. 408;
Mossman v. Government, 10 Haw. 421;
Rooke v. Hospital, 12 Haw. 375;
Branca v. Makuakane, 13 Haw. 499.

After enacting into law in the broadest terms the principles of the devisability of all property, of the descendibility of all property, of the assignability of choses in action, of the taxability of all interests in property, and of the right of the government to

take *in invitum* all interests in property for state purposes,—after providing by written law for the termination of the old feudal tenures which were devoid of the characteristics of assignability, descendibility and devisability, and for the substitution of a modern system of individual ownership accompanied presumably by its features of salability at will, descendibility and devisability; after declaring judicially that the English feudal system has no place in Hawaii and after expressing judicial disapproval of its doctrine that litigation would be promoted too readily by permitting assignability at law of choses in action and by permitting disseisees to deed their interests to strangers; after judicially declaring that estates tail and conditional fees have no place here because they are inconsistent with the principles of our statutes of descent and wills and with other local conditions generally; and after declaring that champerty and maintenance are not contrary to our laws,—how can we consistently incorporate now as a part of the law of Hawaii that feature of the common law of England, if such it was, which declared that a remainder contingent upon the survivorship of the devisee at a stated time is a mere possibility and not a possibility coupled with an interest and, therefore, not assignable at law even though assignable in the eyes of a court of equity? The history of Hawaii's land tenures and all of its judicial declarations on the subject have proceeded upon the theory of the freedom of alienation of all property with perhaps certain exceptions,

immaterial in this case, relating to married women. We submit that to now incorporate an exception so glaringly unsound in reason against one class of contingent remainders while other classes of contingent remainders remain alienable at law as well as in equity, would be to progress backward and to run counter to all of Hawaii's judicial and other local history. The exceptions declared in Section 1 of the Revised Laws are just as real as the general rule itself of applicability of the common law. To now hold that contingent remainders and executory devises contingent upon the survivorship of the devisees are inalienable would be to disregard the exceptions plainly stated in R. L., Sec. 1. The exceptions referred to are in Section 1, R. L. 1915, stated to be that the common law of England shall not apply when "otherwise expressly provided by the constitution or laws of the United States or by the laws of the Territory of Hawaii or fixed by Hawaiian judicial precedent or established by Hawaiian usage.

In *Ninia v. Wilder,* 12 Haw. 104, 117, 118, 119, it was held that "a deed from the owners of the contingent fee together with a release from the executory devisees will convey a good and sufficint title; and an agreement for the sale of land entered into between the owners of a contingent fee and the executory devisees with a second party will be specifically enforced against such second party. * * * Executory devises by the modern conception are capable of being devised by will, assigned or conveyed by deed, and of being transmitted by inheritance and

transmission to the devisees' or grantees' heirs or personal representatives." It is there recognized that "at common law the release could not have been made to a stranger under the rule of policy which prohibits the granting or assigning of remote or contingent rights to real estate in the same manner and for the same reason that the common law prohibited the assignment of choses in action," and that this was so "because such transfers were thought to promote litigation." Hawaii has always shown that she has not the same fears with reference to maintenance or the promotion of litigation in any such way. It was "to prevent maintenance and the multiplying of contentions and suits" that it became "an established maxim of the common law that no possible right, title or any other thing that was not in possession or vested in right could be granted or assigned to strangers." Referring to a case where the release by contingent remaindermen was to one of the parties in possession having title, the court said, "But it matters not here whether the release be to a party in possession or to a stranger, having seen that in *Mossman v. Hawaiian Government,* supra, the common law rule as to conveyances of one not in possession to one not in possession is not in force in this jurisdiction." In concluding the court held that the case was not upon debatable ground and that the deed offered by the contingent remaindermen conveyed a good and sufficient title. The contingency in that case was as to the survivorship of the devisees. See also *Brown v. Spreckels,*

18 Haw. 91, 95, 96, and the same case in 212 U. S. 208, 210.

13.

THE SONS' PRIVILEGE OR RIGHT TO PAY $5000 AND TO CAUSE THE LANDS TO BEFALL ON THEM WAS NOT PURELY PERSONAL BUT WAS ASSIGNABLE.

There is no foundation in the will for any contention that the devise to the sons was purely personal. Whether it was or not depends entirely upon the language used by the testator. The view that it was is, it is submitted, utterly untenable. The language of the devise is entirely similar to that of an ordinary devise. Surely the testator did not mean that he was giving the lands to Frank, Henry and Christian without any power or right on their part to transfer that right, whether before or after it should become vested, to another. If he did mean that in this will then every testator means it when he says in substance, "I give my homestead to my daughter Frances," or "I give my cattle ranch to my son John." So also any claim that the right to make the payments of $5000 each and thus to cause the devise of the lands to the sons to become operative was intended to be a purely personal privilege is utterly untenable. It is nothing more than an ordinary condition the substance of which is "I give you that land on condition, however, that you pay your sister five thousand dollars." What the testator in such

a case wishes is that his daughter shall have $5000 and his son the land. Whether the $5000 is taken out of other moneys then had by the son or is carved out of the land devised by way of a mortgage placed thereon by the son or is secured by the son by a sale of his interest is a matter of immateriality to the testator. Nowhere in the will is any indication given of any desire on the part of the testator to prohibit the alienation of the lands referred to in Article "Third" or of any interests or rights therein, whether by the sons or by the daughters. In Article "Second" the testator did express his desire (even though ineffectively) that the ten particular lots of land there mentioned should be inalienable to anyone outside of the Bertelmann family; but no such suggestion, directly or indirectly, is made with reference to the bulk of the lands owned by him and being those mentioned in Articles "Third" and "Fourth." Under the express words of Article "Fourth," the lands could be sold under certain circumstances and the proceeds in money given to the persons there named. Under Article "Fourth" the children did very clearly have the right to dispose of the land or its proceeds, each as he saw fit. If it had been intended to accomplish something out of the ordinary by Article "Third," the testator certainly would have used some language to express that intention; but he has not done so. If the provisions are read in their ordinary, every-day meaning no such restrictions or limitations can be construed out of them. It would have been very simple, indeed, for the tes-

tator to have added a statement to the effect that the right to pay the $5000 was intended to be entirely personal to his sons and to be non-exercisable by anyone else and inalienable. By Article "Second" he has shown that he knew how to express the wish when he had such a wish. It is reasonable to suppose that he would have made some similar statement if he had meant some similar limitation in Article "Third." Nothing but conjecture can be called to the support of any theory relating to a purely personal privilege or option. To read such a provision into the will would not be construction. It would be making a will for the testator.

To find from the authorities or to say that a purely personal privilege is not assignable is not to make any progress in this case. The question still remains, Did the testator intend to make in Article "Third" the gift to the sons a purely personal one or to make it possible for them personally and no one else to pay the sums named? and that is to be determined solely as a matter of construction of the terms of the will.

The mere absence of the word "heirs," of course, does not cut down the estate given to the sons. The word is not necessary in Hawaii to the creation of a fee. *Branca v. Makuakane,* 13 Haw. 499. This would be true whether the remainder is to be regarded as a vested or a contingent one or as being by way of executory devise.

Certainly under the terms of the will the sons immediately upon the favorable happening of the con-

tingency and the payment of the sums named would be entitled to sell the whole of their vested interest. So also it is clear that even prior to the vesting of the estate they would, in so far as any restrictions to the contrary appear in the will, be entitled to mortgage their contingent interests in order to secure the funds with which to pay the $5000 to each surviving daughter. They certainly could also enter into a contract to secure the $5000 and to sell upon the happening of the contingency their interests in the land. Why should the line be drawn at an out and out sale before the happening of the contingency? That the law would permit them to do all of these things we have already argued above. That the testator said absolutely nothing to show an intention on his part to prohibit them from doing them is what we are now contending. If such a limitation was intended,—if the testator's desire was to make it possible for the sons and no one else to pay the sums named or to hold the land, where are the words that show this, directly or indirectly? We fail to find them and we submit that they are not there. The majority opinion below has not pointed them out. The whole policy of the law is in favor of freedom from restraints against alienation and courts cannot construe such restraints into a will unless the testator has used language showing that it was his intention to impose them.

Would it not be in aid of the devise to the sons to permit them freedom of action so that they could, if necessary, mortgage or even sell a part of their in-

terests in order to obtain the five thousand dollars for each surviving daughter and thus retain for themselves the remainder—perhaps the larger part —of the lands? There is nothing in the will to indicate directly or indirectly that the testator desired that the sons should not have this freedom.

14.

OPTION.

What has been said against the theory of a purely personal privilege applies as well against the theory of an option. The mere use of the statement that "the two or the one of my sons will have a right to *buy* the whole of my lands" does not suffice to establish the theory of an option. The testator did not intend thereby to convey the idea that the daughters and shortcoming sons, if any, would first own the lands and that thereafter the non-shortcoming sons would have to buy it from them upon the terms stated if they wished to acquire it. On the contrary, his own words are that it is his sincere wish and will that his lands "shall *befall* in equal shares and interest upon my three sons," with the proviso that they make the payments stated. The lands were to *befall* upon the sons, not by way of sale or conveyance from the daughters, but very clearly by way of devise and gift from the father. It is submitted that the theory of an option is insupportable in the light of the language of the will as a whole. Even assuming, however, that an option is given, which we deny,

it is well-known law that an option to purchase land based upon a valuable consideration and irrevocable creates an interest in the land and is assignable even before acceptance and even though it does not by its terms run to the assigns of the party to whom it is given.

Kreutzer v. Lynch, 122 Wis. 474;
Calanchini v. Branstetter, 84 Cal. 249;
Robinson v. Perry, 21 Ga. 183;
House v. Jackson, 24 Ore. 89;
Kerr v. Day, 14 Pa. 112;
Napier v. Darlington, 70 Pa. 64;
Wilkins v. Hardaway, 48 So. (Ala.) 678.

If there is any option at all in the Bertelmann will, it is irrevocable. It was created by the testator by an instrument which after his death was irrevocable and would stand upon the same footing as to assignability as an option given for a stated time for a valuable consideration.

15.

CONCLUSION.

It is submitted that the ruling of this court should be (a) that Catherine Haunani Bertelmann, having died prior to the expiration of the lease, although after the death of the testator, was not one of the "surviving daughters" referred to in Article "Third" as entitled to receive payments of $5000.00 each, that her children and heirs are not now entitled to any payment of $5000.00 and have no interest whatever

in the property devised by Article "Third" and that as against her heirs, the present defendants in error, the plaintiff in error is, without being required to make any payment to them, the sole and undisputable owner in fee of all of the property devised by Article "Third"; or, if this court is of the opinion that under a correct construction of the will Catherine Haunani Bertelmann was one of the "surviving daughters" referred to in Article "Third" because she survived the testator and that her heirs are now the owners of an undivided one-ninth interest in the lands in question, (b) that the condition named in Article "Third" is not now impossible of performance, that Mary N. Lucas has the right to defeat all of the interest of the defendants in error and to become as against said defendants in error, the undisputable owner in fee simple absolute of all of said lands and of every interest therein, by paying or tendering $5000 to said defendants in error within one year from the expiration of the 25 years' lease, and that the ownership of said defendants in error of said one-ninth interest is subject to be defeated by said Mary N. Lucas upon payment or tender by her of the sum of $5000 withon one year from the expiration of the said lease. Judgment should be ordered accordingly.

Respectfully submitted,

ANTONIO PERRY,

Attorney for Plaintiff in Error.

Dated, Honolulu, T. H.,

August 22, 1916.

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